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Supreme Court, U.S.
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In The William K. Suter, Clerk
Supreme Court of the United States

WILLIAM EDWARD PIERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Despite petitioner's repeated attempts to fire his retained attorney, beginning months before trial and continuing until the eve of trial, and despite the absence of a valid reason for not withdrawing, counsel refused to file a motion to withdraw until six days before trial, and even then did not support the request, disparaging his client instead. The motion was denied as untimely, and at trial, counsel made numerous harmful decisions that he could not justify, even in hindsight, and that individually and cumulatively prejudiced petitioner's defense in well-documented ways.

1. Did the Court of Appeals err in refusing to examine the issue of actual prejudice, instead concluding that the evidence against petitioner was overwhelming, even though the damaging trial record relied on by the court was the product of the deficiencies of the lawyer who should have been replaced but for his own refusal to withdraw from the case when his client demanded?

2. Although not passed on by the Court of Appeals, the record is sufficient and the interest of justice requires that the Court decide this additional question:

Did counsel for petitioner render ineffective assistance where he was able to identify no strategic or tactical reasons for refusing to move to withdraw as counsel or for any of the numerous other detrimental decisions he made that damaged petitioner's case at trial?

PARTIES TO THE PROCEEDING

There are no other parties to the proceeding beyond those listed in the caption and no party is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William Edward Piers respectfully submits this petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in *United States v. Piers*, Ninth Circuit No. 07-35342.

OPINIONS BELOW

The unpublished opinion of the Ninth Circuit Court of Appeals (App. 1-4) is reported at 312 Fed. Appx. 69 (9th Cir. 2009). The Order of the United States District Court for the District of Alaska (App. 5-39) denying petitioner's motion under 28 U.S.C. § 2255 is not reported. The District Court magistrate's initial recommendation (App. 45-115) is not reported, but can be found at 2005 WL 2786079 (D. Alaska, Oct. 21, 2005). The District Court magistrate's final recommendation (App. 42-44) is not reported. The order of the Court of Appeals (App. 116) denying rehearing is not reported.

JURISDICTION

The Ninth Circuit Court of Appeals entered judgment on February 12, 2009. The Ninth Circuit Court of Appeals denied petitioner's Petition for Rehearing En Banc on April 27, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides, in relevant part: "No person . . . shall be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

The Sixth Amendment to the U.S. Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI.

28 U.S.C. § 2255(a) provides, in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

A. Introduction

The principal issue presented by this petition is whether the Court of Appeals improperly denied petitioner's claim of ineffective assistance of counsel because it found the evidence against him to be overwhelming. Petitioner's primary claim of ineffectiveness

is his retained counsel's unjustified refusal to move to withdraw for months, in the face of repeated demands by petitioner to withdraw, until the eve of trial when the motion was denied as untimely. In addition, counsel committed numerous specific acts of incompetence during the pretrial and trial stages. The result was a trial and record that were entirely skewed from what would have taken place had petitioner been properly represented. Because trial counsel failed to take timely steps to withdraw, and because that failure negatively affected the entire trial, the verdict against petitioner should be set aside and a new trial granted.

The Court of Appeals disregarded this Court's teachings in *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny by assessing the question of prejudice solely based on the actual record, rather than on what the record would have been but for the numerous errors by trial counsel. The Court of Appeals thus also failed to treat this case like those where defense counsel had a conflict of interest, where prejudice is presumed if the defendant establishes the conflict of interest and shows that it "adversely affected his lawyer's performance." *Id.* at 692.

Trial counsel's deficiencies included acts of commission and omission. Significantly, there is one overarching pattern to trial counsel's conduct: he offered no reasonable explanations for any of his decisions that could remotely justify his conduct – even at the evidentiary hearing on the 2255 motion.

Under *Strickland*, to establish ineffective assistance of counsel a defendant must show not only deficient performance, but also that prejudice resulted. *Id.* at 687-88. On appeal, petitioner focused both on trial counsel's numerous instances of deficient performance and the resulting prejudice. The Court of Appeals did not address the adequacy of trial counsel's performance, instead ruling that, because the record supporting petitioner's guilt was so strong, he failed to satisfy *Strickland*'s prejudice requirement, and affirmed the judgment below. As a result, the only issue on which there is an appellate ruling is whether the court properly handled the issue of prejudice when the principal claim of ineffectiveness was that counsel unreasonably refused to move to withdraw in the face of repeated demands from petitioner to do so. This resulted in petitioner going to trial with an attorney he did not trust and who did not trust him; an attorney who actively impugned and denigrated petitioner before the trial court; an attorney with whom he was not even speaking. Because the proper treatment of prejudice is intertwined with the various claims of ineffective assistance of counsel, petitioner requests that the Court exercise its discretion and decide the claims of ineffectiveness as well.

B. Pretrial Matters

This case involves a June 2000 robbery of a credit union in Anchorage, Alaska. Petitioner and two codefendants, Donald Franklin and Raymond Hubbard,

were indicted on various counts, falling into two general categories: the robbery (including a related conspiracy charge) and the use of a machine gun during the crime (also including a related conspiracy charge).[1] The government's theory of the case was that petitioner participated in both planning and executing the crime, and that petitioner fired a machine gun at a police vehicle during the chase that ensued after the robbery. Petitioner was convicted of six counts, including both conspiracy charges and the machine gun charge, and was sentenced to 468 months of incarceration. 360 of those months were due to the machine gun charge, which carried a mandatory consecutive 30-year sentence.

Petitioner and his mother, Mary Hutchison, retained attorney Rex Butler. ER2 201-02.[2] In addition to Butler's $7500.00 retainer, Mrs. Hutchison gave

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[1] Specifically, Count 1 charged petitioner with Conspiracy to Commit Armed Credit Union Robbery; Count 2 charged Armed Credit Union Robbery; Count 3 charged Conspiracy to Commit a Violation of 18 U.S.C. § 924(c)(1)(A) (use of a machine gun during a crime of violence); Count 4 charged Carrying a Semi-automatic Weapon During and In Relation to a Crime of Violence; Count 5 charged Using a Machine Gun During and In Relation to a Crime of Violence; Count 6 charged Possessing a Firearm with an Obliterated Serial Number; and Count 7 charged Attempted Armed Credit Union Robbery. Count 7 alleged petitioner's involvement in an earlier attempted robbery of the same credit union. Petitioner was acquitted of Count 7.

[2] "ER" refers to the three-volume Excerpt of Record filed in the Ninth Circuit with petitioner's appeal (No. 07-35342). The number immediately following "ER" denotes the volume.

him $2500.00 specifically earmarked for investigation. *Id.* Butler, however, did no pretrial investigation, nor did he hire an investigator or refund the $2500.00. *Id.*

In the months leading to trial, the relationship between Butler and petitioner deteriorated to the point where the two were not speaking. Both petitioner and his mother fired Butler, orally and in writing, multiple times months before the trial. ER2 123-24, 202. However, Butler waited until January 30, 2001 – six days before trial – to move to withdraw. *United States v. Franklin*, 321 F.3d 1231, 1237 (9th Cir. 2003). After a hearing, the district court denied the motion, due in large part to its untimeliness.

C. The Trial

The government's principal witnesses were the two credit union tellers present when the robbery occurred, petitioner's codefendant and cooperating witness Hubbard, several Anchorage Police Department (APD) officers, a firearm forensics expert, a fingerprint examiner, the landlord of the apartment that petitioner and codefendant Franklin shared, and FBI agent Luann Henderson.

Through their testimony, the government established that Franklin, a former employee of the credit union, provided the conspirators with security information, operations details, and the layout of the credit union. During the robbery, a man dressed in black, including a black mask, entered the credit

union with a handgun and bound the tellers before taking money from the vault. The robber triggered a tracking device and activated a silent alarm. APD officers in patrol cars pulled into the credit union parking lot as the robber exited the building. The robber entered a minivan driven by Hubbard and a chase ensued. ER3 10-17. APD Officer Dan Reeder testified that someone matching Hubbard's description fired a machine gun out of the minivan at his patrol car. ER3 31-32. Specifically, Reeder testified that the person who fired the machine gun had a goatee and was wearing a faded Carhartt jacket. ER3 31-32. As confirmed by physical evidence and testimony from multiple government witnesses, including Hubbard himself, Hubbard – and only Hubbard – wore a fake goatee and a faded Carhartt jacket that day, and he was in the fleeing minivan. ER3 8, 27-28, 30, 62, 126, 128-31.

Inexplicably, after Officer Reeder identified Hubbard as the shooter of the machine gun, petitioner's attorney, Butler, pressed him on the issue, eliciting with his final cross-examination question that Reeder never saw the person who did the shooting:

> Q [by Butler]: And it sounds from your testimony, sir, that you never did see the person who was doing the shooting.
>
> A [by Reeder]: No.
>
> Q: Okay. Sir, that's all the questions I have.

ER3 32-33.

Having effectively erased the testimony of the only neutral witness who identified someone other than petitioner as the shooter, Butler left the jury with only the testimony of now-cooperating witness Hubbard, who testified that petitioner was the shooter. ER3 13, 16.

Reeder further testified that he slowed down after the machine gun fire and that eventually the robbers abandoned the minivan and entered a Ford Bronco. ER3 10-17, 29. The chase continued until the Bronco crashed through a gate at a car dealership and came to rest in a swampy area. ER3 10-17. At least two individuals exited the Bronco. ER3 27. Hubbard was apprehended after a foot chase. Petitioner was discovered a short time later in the area, wearing dark clothing but no mask. A mask and other items allegedly worn by the robber were found near the Bronco.

Petitioner was arrested and placed in a patrol car, where APD Officer Matthew Bloodgood questioned him without administering *Miranda* warnings. Petitioner allegedly stated, "Everything is in my name, it's all mine." ER3 61. A second unmirandized custodial interrogation occurred at the Anchorage Police station. During this videotaped interrogation by APD Detective Nick Vanderveur, petitioner stated, "I know I already turned myself into a criminal and pretty much disgraced my family . . . obviously I'm gone for a long time." ER3 132. Despite the lack of *Miranda* warnings, and despite the clearly custodial

nature of both interrogations, Butler did not move to suppress or otherwise object to either statement.

Written plans for the robbery were found in Hubbard's backpack, left in the Bronco. A copy of the plans was on a diskette found in a bedroom at the address both petitioner and codefendant Franklin gave their former landlord as a forwarding address when they moved out of the apartment they shared. ER3 59. Some firearm parts, with partial serial numbers matching the machine gun used in the getaway, were also discovered in the bedroom. ER3 40-57.

Although petitioner is a "secreter" – an individual biologically predisposed to leaving prints – his fingerprints were not on the machine gun. ER3 39. A latent palm print matching petitioner was found on a garbage bag recovered from the minivan, and his fingerprint, as well as Hubbard's, was found on the robbery plans.

Hubbard testified that an uncharged member of the conspiracy – Adam – was involved. ER3 6-7, 19-21. FBI Agent Henderson confirmed that Hubbard spoke of Adam from the beginning of the investigation, and that the FBI was trying to locate him. ER2 195, ER3 64. Yet, despite petitioner's multiple pleas to Butler to investigate and locate Adam, and despite paying Butler $2500.00 for investigation in addition to his fee, Butler did not hire an investigator or take any other steps to try to locate Adam. In fact, though his client faced nearly 40 years of prison,

Butler did no pretrial investigation whatsoever, choosing instead to rely on the investigation of the adverse party, the United States, which was focused on convicting petitioner. ER2 183-84.

Other errors by Butler seriously affected the trial. Butler did not give an opening statement at the beginning of trial – as he requested, the court told the jury that he was reserving his opening "until a later time." ER3 3-4. Despite this assurance, Butler never gave an opening statement. Thus, as the government presented its case, the jury, with no defense theory as a backdrop, considered the evidence only in light of the damning indictment of petitioner presented during the government's opening statement. Further, it meant that the first time Butler addressed the jury directly was in his closing argument, where he began by conceding his client's guilt to the conspiracy charges, without even telling petitioner that he was planning to do so. Butler did not distinguish for the jury which of the two conspiracy counts he was conceding (Count 1 was conspiracy to commit armed credit union robbery; Count 2 was conspiracy to use a firearm during the commission of the robbery), leaving the jury with no choice but to assume he was conceding guilt on both of them and, implicitly, each of the overt acts alleged as part of the conspiracies – one of which was the use of the machine gun. ER3 139. Moreover, Butler's concessions lent credibility to the only witness who identified petitioner as the shooter – Hubbard, who had become a cooperating witness.

Finally, in his closing argument, Butler did not marshal *any* facts that would have provided strong support for the theory that petitioner did not fire the machine gun. At the 2255 evidentiary hearing, when he could recall the details of the case at all, Butler testified that instead of arguing such facts during closing, he simply relied on the jury's independent recollection of the evidence presented during the 5-day trial. ER2 175-78, 180, 189.

Butler never argued that Reeder – at whom the machine gun had been fired – identified Hubbard as the shooter. He did not argue that no fingerprints were found on the machine gun, although petitioner was a "secreter." This evidence would have been particularly helpful to petitioner because his palm print and a fingerprint were found on other pieces of evidence connected to the crime.

Agent Henderson testified at trial that she "always assume[s]" that co-conspirators are not telling the truth. ER3 65. Butler, who very much needed to cast doubt on Hubbard's credibility, did not call this testimony to the jury's attention, instead relying on the jury's recollection. Likewise, Butler never argued to the jury the great incentive Hubbard had, as a cooperating witness who already signed a plea bargain, to curry favor with the government and exculpate himself as the shooter by blaming petitioner instead. Butler also failed to remind the jury that codefendant Franklin had access to the room in which much of the evidence relating to the robbery and machine gun were found.

At trial, a government expert testified that the machine gun could have been fired wildly with one hand. ER3 37-38. This fact would have supported an argument that Hubbard was both the driver and the shooter, because no bullets hit Reeder's vehicle. Reeder had previously identified Hubbard as the shooter. Butler never argued this critical point in closing, and his reasoning for not doing so was based on his erroneous assumption that bullets from the machine gun hit the hood of Reeder's patrol car, and as such, according to Butler, he could not have credibly argued that the machine gun had been fired wildly. ER2 191. However, the record is clear that no bullets ever hit Reeder's car. ER3 29.

In short, despite Butler's inadequate performance, there was still much evidence to cast doubt on petitioner as the shooter. Butler not only misunderstood important evidence in Piers's favor, he also failed to marshal any of the strong facts in support of this theory during his closing. He believed his failure was justified – he did not need to restate things in closing argument because he assumed the jury had already heard them. That the jury convicted petitioner of all of the most serious charges against him was hardly surprising in light of Butler's seriously deficient performance.

D. The Direct Appeal

On direct appeal, petitioner's principal claims as they may bear on this petition were that he was

denied his Sixth Amendment right to counsel due to an irreconcilable conflict with Butler, the district court abused its discretion in denying Butler's Motion to Withdraw, and the evidence was insufficient to show that he fired the machine gun. The Ninth Circuit affirmed the convictions. *Franklin*, 321 F.3d at 1242. Although the court vacated the sentence imposed on Count 4, it did not affect petitioner's underlying sentence. *Id.* This Court denied certiorari. *Piers v. United States*, 540 U.S. 858 (2003).

E. 2255 Motion Proceedings

On September 30, 2004, petitioner filed a timely Motion to Vacate under 28 U.S.C. § 2255 in the Alaska District Court. ER2 244-87. The motion was referred to Magistrate Judge Roberts. On August 15 and 16, 2005, Magistrate Roberts held an evidentiary hearing on the motion. At the hearing, petitioner, through his new counsel, proffered the testimony of an eminently qualified expert on the general standards of effective assistance of trial counsel, and, specifically, on why Butler's performance in this case was woefully inadequate. ER2 205-17. Magistrate Roberts refused to allow the expert to testify. ER1 103-04.

In briefs and at the 2255 evidentiary hearing, petitioner's new counsel pointed to numerous ways in which Butler's performance was constitutionally deficient. In general, they fell into two categories: affirmative acts by counsel that had significant negative

impacts on petitioner's case, and failures by counsel to take actions that would have improved petitioner's defense in specific ways.

The first and most serious improper act by Butler was his obstinate refusal to move to withdraw over a period of three months, despite repeated demands from petitioner and petitioner's mother that he do so. Butler's own testimony from the evidentiary hearing confirmed that petitioner had told him to withdraw several times well before trial, yet he refused to make the motion until it was obviously too late, for no reason other than his personal preference to remain on the case, despite the fact that petitioner clearly did not want him to continue.[3] He never offered even a colorable reason for this, beyond his assertion that it was his practice not to withdraw on the first request to do so, although it was clear to him that the attorney-client relationship had broken down.

The evidence shows that petitioner and Butler were not communicating at the time of trial or in the

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[3] Butler testified he did not move to withdraw earlier because it is his practice not to move to be relieved until a client demands it several times. ER2 124 ("I would not have filed [a motion to withdraw] on just the first or second saying 'I don't want to deal with you'. . . ."); 126 (testifying he would not necessarily move to withdraw even after a client "expresses dissatisfaction repeatedly and asks [him] to get off the case"). Butler claimed that he is entitled to continue representing a client in the face of the client's repeated demands to withdraw as long as Butler feels he "can still get the job done for the client." ER2 126.

months leading to it. *E.g.*, ER2 129-30. Butler stated at the hearing on the Motion to Withdraw that petitioner refused to see him when he went to visit him in jail. ER3 97, 99. Butler testified that "it might well be" true that they were not speaking at the time of trial. ER2 128. In a letter to the court and jury written the day before his trial, petitioner stated, "[I]t is my firm opinion that . . . who my council [sic] will be has been mandated by the court, I have not received adequate legal council [sic] and I do not recognize my forced council [sic]." ER3 95. Butler himself, when he finally did file the Motion to Withdraw, cited "the break down in attorney client communications" as one of the reasons. *Franklin*, 321 F.3d at 1237. These statements, along with the highly contentious statements petitioner made at the hearing on the Motion to Withdraw, prove that, at some point well before trial, the attorney-client relationship had deteriorated to the point of nonexistence.[4]

During the hearing on the Motion to Withdraw, Butler actually argued against his client's wishes and

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[4] Petitioner told the court, "This is an ongoing problem with counsel, and I don't believe he has my best interest at heart" (ER3 97); "Mr. Butler . . . you haven't acted upon the evidence that I've given you or the information, and I have proof to that effect" (*id.*); "[W]hen Mr. Butler has seen me . . . [h]e's never responded to my questions. He hasn't provided me any legal counsel" (ER3 98); "[Mr. Butler,] you haven't been doing anything" (ER3 99); "[T]his is simply not true" (referring to Butler's explanations) (ER3 100); "That's a lie" (referring to Butler's explanations) (ER3 101).

made disparaging remarks about him.[5] Although given ample opportunity, at no time did Butler argue that the motion should be granted. In fact, he stated the opposite: "[I]f the case is to go forward, we'll be prepared to go forward. That's the bottom line." ER3 100. Not surprisingly, the motion was denied, and petitioner went to trial with a lawyer he neither wanted nor trusted – a lawyer with whom he was not even speaking – and who had no confidence in petitioner's case.

The 2255 evidentiary hearing confirmed that there was no strategic reasoning behind any of the numerous additional acts of deficient performance by Butler at trial. He waived an opening statement, saying he would postpone it until the defense case began, but then never gave one. In his closing argument, he conceded petitioner's guilt on several counts, without consulting with petitioner first.[6] Moreover, after conceding guilt to the jury, he offered

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[5] Butler essentially told the court his client was a liar, stating that petitioner had sent him on a "wild goose chase" (ER3 100); that he "wonder[ed] . . . quite frankly, whether this is a figment of [petitioner's] imagination or is the truth of the matter" (ER3 101); and that he had "lost some faith in being able to rely on information" provided to him by petitioner (ER3 102).

[6] Butler told the jury, "We're not here today denying that Mr. Piers was part of a conspiracy to rob Credit Union 1. There is no contesting that. We're not here to do that." ER3 69-70. Later, he reiterated: "Yes, ladies and gentlemen, my client was involved in the conspiracy to take money from Credit Union 1 Diamond Branch." ER3 73.

no arguments to support an acquittal on the remaining counts of conviction, including the most serious in terms of potential prison time – the use of a machine gun in the course of the robbery. Again, it was on the machine gun charge that Butler made his most serious and costly error. Officer Reeder, who drove the patrol car fired upon by the machine gun, testified that codefendant and cooperating witness Hubbard was the shooter, even though the theory of the prosecution was that the shooter was petitioner. After Reeder identified Hubbard, Butler inexplicably and incompetently elicited with his final question that Reeder never saw the shooter. Reeder was the only eyewitness to the shooting other than Hubbard. Thus, the jury was left to believe that it was petitioner, not someone else, who fired the machine gun. At the evidentiary hearing, Butler was unable to explain why he asked Reeder that final, thoroughly damaging question.

The 2255 evidentiary hearing also confirmed deficient performance in the form of Butler's omissions. The most significant failure was not moving to suppress the two incriminating statements petitioner gave the police during custodial interrogation, but without having been given *Miranda* warnings. Butler acknowledged that the statement given to APD Officer Bloodgood was "damaging," but could not recall why he did not file a motion to suppress. ER2 146-47. He agreed that it was a mistake under these circumstances. ER2 148. The failure cannot be justified as a tactical maneuver.

The second statement that should have been suppressed was even more damaging because it was videotaped. After viewing the tape at the 2255 evidentiary hearing, Butler agreed that it was "extremely damaging," and that "if there had been any grounds to move to suppress that statement a motion to suppress should've been made." ER2 149. The government focused on this statement as proof of guilt, reciting it once during opening statement and twice during closing argument, characterizing it as a confession. ER3 2, 67, 93. When asked whether it occurred to him to file a suppression motion, Butler stated that petitioner's statement "wasn't really . . . in reference [sic] to questioning by officers," ER2 154, even though custodial interrogation includes not only express questioning by law enforcement, but also "its functional equivalent," i.e., "any words or actions on the part of the police . . . that police should know are reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). When reminded of the *Innis* doctrine, Butler incorrectly stated it only applies if direct questioning by police eventually follows. ER2 155-56. Butler added that he still believed "that that statement is not suppressible. . . . I don't even think it's a close question." ER2 157.

One of the reasons petitioner wanted Butler off the case was that, although Butler had been paid an additional $2500.00 to conduct pretrial investigations, he had done nothing. ER2 120, 136-43, 199, 201-02. In particular, petitioner had strongly urged

Butler to locate a person known as "Adam" whom petitioner – and the police and Hubbard – believed had a major role in the robbery. ER2 194-95. Butler refused even to start to look for Adam, suggesting that he was a figment of petitioner's imagination, further demonstrating the breakdown between client and counsel that should have compelled Butler to withdraw immediately. ER3 101. Finally, the evidentiary hearing made clear that Butler failed to develop, let alone implement, any coherent theory of defense on which the jury might have acquitted petitioner on at least the machine gun charge.

After further briefing subsequent to the 2255 evidentiary hearing, and after petitioner submitted fourteen pages of objections to Magistrate Roberts's initial factual and legal findings, Magistrate Roberts issued his Final Report and Recommendation. App. 42-44. In it, Magistrate Roberts declined to alter any of his findings in light of petitioner's objections, and recommended that petitioner's 2255 motion be denied. On November 16, 2006, Judge H. Russell Holland, who had presided over petitioner's trial, denied the 2255 motion, adopting the majority of Magistrate Roberts's findings. App. 5-39.

A timely appeal was filed, with jurisdiction based on 28 U.S.C. § 1291, and the case was briefed and argued with an almost exclusive focus on whether Butler's representation had fallen below the constitutional minimum. The Court of Appeals, in a per curiam memorandum disposition, skipped the issue of deficient performance and decided the case solely on

lack of prejudice grounds. App. 1-4. Without connecting the main ground for the ineffectiveness claim that infected the entire trial – Butler's refusal to move to withdraw in a timely or effective manner – the court apparently assumed that the trial record would have been the same with different counsel, and on that basis found the record made by Butler to be overwhelmingly against petitioner and affirmed the denial of the 2255 motion.

REASONS FOR GRANTING THE WRIT

Review should be granted in this case because the Court of Appeals seriously misapplied the two-part test for ineffective assistance of counsel set forth by this Court in *Strickland*. Petitioner does not dispute that a court may reject claims of ineffective assistance on lack of prejudice grounds, without deciding whether the representation was constitutionally deficient. Rather, his objection is that, in assessing prejudice in this case, the court reviewed only the record made by Butler, who was presumptively ineffective and should not have represented petitioner in this case. Thus, it was unrealistic and unreasonable for the Court of Appeals to make an assessment of prejudice based on a record that was significantly marred by Butler via his representation of petitioner that should never have occurred. Instead, because Butler refused to withdraw from the case when his client discharged him, the situation is closely analogous to cases in which trial counsel had a

conflict of interest that should have disqualified him from trying a case and in which prejudice is presumed. *See, e.g.*, *Strickland*, 466 U.S. at 692. Further, though such a presumption would be appropriate here, petitioner does not ask the Court to set aside his conviction based on a presumption alone; aside from Butler's refusal to withdraw, there are multiple specific incidents of deficient performance by Butler that directly affected the outcome of the trial (and at the same time created the poisoned record the Court of Appeals improperly relied on in assessing prejudice).

Although the issue of the adequacy of Butler's performance was not decided by the Court of Appeals, the record is sufficient to enable this Court to decide that question. Moreover, because petitioner has been incarcerated since he was arrested in June 2000, and because the Court of Appeals was plainly hostile to his claims, the interests of justice strongly suggest that this Court should exercise its discretion and decide the ineffectiveness claims presented by petitioner.

A. The Approach to Determining Prejudice Taken by the Court of Appeals Is Inconsistent with *Strickland* and Other Decisions of This Court.

Under *Strickland*, to uphold an ineffective assistance of counsel claim, a court must find both deficient performance by counsel and prejudice resulting

from it. 466 U.S. at 687-88. Where the prejudice question can be more easily decided, a court may resolve the claim on that basis, as the Court of Appeals did here. According to the Ninth Circuit, because the evidence against petitioner was overwhelming, the adequacy of counsel's performance was irrelevant. The flaw in that approach is that the court examined the record without taking into account that much of the most damning evidence against petitioner would have been excluded by competent counsel; likewise, additional evidence and arguments that competent counsel would have included were not considered by the Court of Appeals in the prejudice analysis. The court simply took the record as it was, without considering how the trial might have been different if petitioner had competent counsel. In doing so, it violated *Strickland* and was inconsistent with every case from this Court since *Strickland*.

To be sure, no case explicitly states that the prejudice review must be undertaken with a "corrected" record, but that is what this Court has done in all post-*Strickland* cases. A clear example is *Rompilla v. Beard*, 545 U.S. 374 (2005), where the issue was whether counsel had failed to properly investigate mitigating circumstances to present at sentencing in a capital case. If this Court had done what the Court of Appeals did here – examine the record without any possible additional mitigating evidence – the decision to uphold the conviction would have been summarily affirmed. Yet this Court reversed due to counsel's failure to follow obvious

leads and investigate mitigation evidence regarding defendant's childhood, mental health, and alcoholism that competent counsel would have pursued. *Id.* at 390-93. The four dissenters did not suggest that it would have been appropriate to end the case with a review of the record as it stood; they disagreed mainly about the level of deference the Court gave to the state court's findings on ineffectiveness. *Id.* at 404-05 (Kennedy, J., dissenting). The same approach was taken in the Court's two other recent ineffective assistance of counsel cases – *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000) – prejudice is determined based on what the record might have been with competent counsel, not solely on what it was with ineffective counsel.

Even more significant than the Court of Appeals' failure to consider what competent counsel would have *added* to the record is what would have been *subtracted* from the record had petitioner had effective counsel. Butler's two most egregious errors were 1) negating the main evidence that Hubbard, not petitioner, fired the machine gun, and 2) failing to move to suppress petitioner's two inculpatory statements, one of which was videotaped and played for the jury. The first error was the result of Butler's unthinking cross-examination, in which he elicited testimony that entirely negated Officer Reeder's positive identification of Hubbard as the shooter. Thus, to sustain the petitioner's conviction for the machine gun charge, the court would have had to find that there was no reasonable probability that this

error affected the outcome of the trial. The court below did not even consider what the record would have looked like without it.

The same is true for the two custodial statements petitioner made. The significant effect such statements have on juries is not the subject of debate, yet the Court of Appeals assumed that their addition to the record had no effect on the jury. Even recent decisions rejecting ineffective assistance claims do not suggest that the issue of prejudice should be determined without examining what the record would have been if the defense had been handled competently. *E.g.*, *Mickens v. Taylor,* 535 U.S. 162 (2002); *Cuyler v. Sullivan,* 446 U.S. 335 (1980). Indeed, to do so would entirely undercut the prejudice prong of *Strickland*'s two-part approach to ineffective assistance claims.

The error in the lower court's approach can be illustrated by a simple example. Suppose a defendant were convicted of possession of heroin, found on his person by police. Suppose further that defense counsel failed to move to suppress that evidence, which formed the sole basis of the state's case. On appeal, with new counsel, the failure to move to suppress is a claimed basis of ineffective assistance. According to the panel in the instant case, courts could reject such a claim due to lack of prejudice by pointing to the admittedly overwhelming record of guilt, even though, if a competent lawyer had succeeded on a motion to suppress, there would have been no evidence to support the conviction.

For these reasons, it is plain that the court below erred in simply looking at the existing trial record and concluding that it overwhelmingly supported petitioner's convictions without even asking what the record adduced by competent counsel would have looked like. The panel's attempt to shortcut the process, because of its apparent belief in petitioner's guilt, cannot stand, and the decision below should be reversed for that reason.

B. The Court Should Decide Petitioner's Claims of Ineffectiveness and Should Sustain Them.

The Court of Appeals did not decide whether any of Butler's acts or omissions met the constitutional standards of performance required by the Sixth Amendment. However, because the record has been fully developed on both the adequacy of Butler's performance and prejudice to petitioner, this Court should exercise its discretion to decide them. *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) (after reaching threshold question, Court may decide underlying questions on the merits).[7] Petitioner has been incarcerated since June of 2000, and if his conviction on the machine gun charge alone is overturned, he will have already served his full sentence on the other charges of conviction. He should not have to wait any

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[7] Recently, this Court decided an issue that had not even been briefed below, let alone decided, because doing so "reduce[d] the likelihood of further litigation." *Polar Tankers, Inc. v. City of Valdez, Alaska*, 129 S. Ct. 2277, 2286 (2009).

longer for a determination of his claims of ineffective assistance of counsel.

1. Butler's Numerous Errors, Beginning with His Refusal to Make a Timely Motion to Withdraw, Were Not Made for Strategic Reasons and Were Otherwise So Far Below the Level of Competent Counsel as to Be Ineffective Under the Sixth Amendment.

This is not a case in which counsel made one incompetent decision that led to an erroneous conviction. Rather, Butler made multiple mistakes: some infected the whole trial, such as the failure to make a timely motion to withdraw,[8] or the failure to perform any pretrial investigation, or the failure to implement a defense theory; others were specific, both affirmative – his damaging cross-examination of Officer Reeder – and negative – his failure to move to suppress petitioner's statements made while in custody. There is a unifying theme to them all. When confronted with his mistakes at the 2255 evidentiary hearing, Butler offered no reasoned explanation for any of them. Thus, unlike the vast majority of cases this Court confronts, this is not a case in which a strategic choice is being second-guessed in a collateral proceeding. Butler had no strategic reason for any of

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[8] As Butler acknowledged, "the closer you get to trial probably the less likely a judge is to grant the motion [to withdraw]." ER2 128.

the decisions that so adversely affected petitioner's case at trial. *Compare Yarborough v. Gentry*, 540 U.S. 1, 9-11 (2003) (counsel not ineffective by mentioning harmful details and not explicitly arguing burden of proof, as part of strategy to appeal to jury's autonomy) and *Strickland*, 466 U.S. at 689 (warning against "second-guess[ing]" counsel's "tactical decisions" and avoiding the "distorting effects of hindsight").

On the main claim of ineffectiveness, it is clear that Butler's refusal to move to withdraw violated the ABA Model Code of Professional Responsibility, the ABA Model Rules of Professional Conduct, and the Alaska Rules of Professional Conduct, and constitutes ineffective assistance. *Strickland*, 466 U.S. at 688-89 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable."). When a client fires his attorney, the attorney has a *mandatory* duty to seek to withdraw. MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(B)(4) (1983) (noting under the "Mandatory withdrawal" section that "a lawyer representing a client . . . shall withdraw from employment . . . if . . . [h]e is discharged by his client"); MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(3) (2004) (same); ALASKA RULES OF PROF'L CONDUCT R. 1.16(a)(3) (2009) (same). *See also* MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. (2004) ("A client has a right to discharge a lawyer at any time, with or without cause. . . ."); ALASKA RULES OF PROF'L CONDUCT R. 1.16 cmt. (2009) (same).

The ethical canons contain no provision for refusing to seek to withdraw when fired by a client if the attorney feels that he "can still get the job done," as Butler did here. ER2 126. The decision is the client's and the client's alone. Butler's refusal to move to withdraw, despite repeated demands to do so, "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 686-88.

As this Court held in *Strickland*, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686. There is no danger here that a finding of ineffectiveness would "dampen the ardor . . . of defense counsel" or "undermine the trust between attorney and client," *id.* at 690, because Butler had no ardor and there was no trust between he and petitioner left to undermine. There was no "exercise of reasonable professional judgment" and no "strategic choices made after thorough investigation of law and facts relevant to plausible options." *Id.* Further, to the extent that "counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions," *id.* at 691, they firmly establish that, starting early in the representation, counsel and petitioner were not communicating effectively regarding investigation and strategy, and not communicating at all as the representation continued. *See Riggins v. Nevada*, 504 U.S. 127, 144 (1992) ("[A] defendant's right to effective

assistance of counsel is impaired when he cannot cooperate . . . with his lawyer."). Indeed, Butler conceded petitioner's guilt on the conspiracy charges without so much as telling him of his plan to do so, and then made no plausible arguments on the all-important machine gun charge. The inescapable conclusion is that the outcome of the trial "was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance [and as a result the trial] was fundamentally unfair." *Strickland*, 466 U.S. at 700.

2. The Combination of Petitioner Being Tried with Counsel Who Should Not Have Been Permitted to Represent Him and the Numerous Erroneous and Harmful Decisions Made by Counsel in the Course of that Representation More than Satisfy *Strickland*'s Prejudice Requirement.

As this Court recognized in *Mickens*, where there is an actual and not simply a potential conflict of interest between client and counsel, no showing of prejudice is required. 535 U.S. at 166. Butler did physically appear on petitioner's behalf at trial, but also had a conflict of interest, though not of the traditional kind in which his allegiance to another client interfered with his duty of loyalty to the defendant. Rather, Butler breached his duty of loyalty to petitioner, thereby creating a conflict of interest, when, over the course of months, he repeatedly

refused to withdraw in the face of his client's demands to do so, which likely would have required him to return most if not all of the $10,000.00 that he had been paid. Moreover, Butler's disparaging remarks about petitioner made during the hearing on the Motion to Withdraw added further evidence that Butler was no longer loyal to his client, creating a conflict of interest. Since Butler should not have appeared for petitioner, the presumption of prejudice applied in conflict of interest cases should apply here as well.

Even if a showing of prejudice is required rather than presumed, this record is replete with such prejudice, beyond petitioner having to go to trial with counsel with whom his relationship had entirely broken down. Perhaps the most egregious omission was Butler's failure to move to suppress the two highly damaging statements – one on videotape – petitioner gave when he was taken into custody. Those kinds of statements are "probably the most probative and damaging evidence that can be admitted against" a defendant, *Arizona v. Fulminante*, 499 U.S. 279, 292 (1991), and the government relied on them heavily during trial and in closing arguments. Since Butler chose not to have petitioner take the stand, petitioner never explained why they should be understood to be far more equivocal than they might appear. It is hard to imagine greater prejudice to a defendant than the failure to preclude the jury from hearing these incriminating statements when there were strong grounds to do so.

Second, equally harmful, if not more so, was Butler's gratuitous cross-examination question of Officer Reeder that negated Reeder's positive identification of Hubbard, not petitioner, as the person who fired the machine gun. Since Butler made no effort to defeat the robbery charges (in fact conceding guilt to them), his only conceivable strategy would have been to focus on the machine gun charge and its associated 30-year mandatory minimum. Yet, his cross-examination question negating Reeder's identification of Hubbard was akin to that of a second prosecutor. Then, after conceding guilt on the other charges, Butler *never* focused the jury's attention on the machine gun charge during his closing argument. The result of this incompetence was a conviction on the machine gun charge and 30 additional years in prison.

Beyond Butler's affirmative acts of incompetence that resulted in a trial record far less favorable to petitioner than it should have been, Butler failed to take other steps that might well have produced evidence that would have provided support for the theory of the case that petitioner urged on his counsel. Petitioner and his family paid an additional $2500.00 to Butler to investigate Adam and other leads suggested by petitioner. Butler simply refused to do so (while keeping the $2500.00), apparently because he did not think petitioner's version was credible. It is impossible to know what an investigation might have turned up, and petitioner does not argue that the refusal to investigate alone would have supplied the necessary prejudice, but it is surely an additional harm that should be taken into account in determining whether

petitioner met the prejudice prong of the *Strickland* test – whether there is a probability, sufficient to undermine confidence in the outcome, that but for Butler's errors, the result of the trial would have been different. 466 U.S. at 694.

Although Butler claimed at the evidentiary hearing that his theory was to focus on the machine gun count, the record is clear that he did nothing to support that theory (his incompetent cross-examination of Reeder being the most glaring example). His lack of a defense theory also showed in his decision to forego an opening statement, but promise to deliver one at the opening of the defense case, and then not give one then either. His concession of guilt on the conspiracy counts during his closing was not even followed by an attack on the machine gun charge or any explanation of why petitioner was nonetheless not guilty of that count.

In sum, although petitioner was technically represented by a licensed member of the Alaska Bar at trial, he might well have been better off with no counsel, or at least one whom petitioner did not want fired and who maintained some modicum of loyalty to petitioner. Both in his affirmative missteps, as well as in his repeated failures to provide competent legal representation, Butler seriously harmed petitioner's defense at trial and thereby prejudiced his case in a manner that easily meets the standard set forth in *Strickland*.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment reversed with a direction that petitioner be granted a new trial. In the alternative, the Court of Appeals should be ordered to consider petitioner's claims of ineffective assistance of counsel without assuming that competent counsel would have produced the same record as that produced by incompetent counsel.

Respectfully submitted,

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July 24, 2009

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM EDWARD PIERS, Defendant-Appellant.	No. 07-35342 D.C. No. 3:cv-04-00236-HRH 3:00-cr-0104-HRH MEMORANDUM* (Filed Feb. 12, 2008)

Appeal from the United States District Court
for the District of Alaska

H. Russel Holland, District Judge, Presiding

Argued and Submitted January 20, 2009
Seattle, Washington

Before: REAVLEY,** Senior Circuit Judge, TALLMAN and M. SMITH, Circuit Judges.

Defendant-Appellant William Edward Piers appeals from the district court's denial of his motion under 28 U.S.C. § 2255 to vacate his convictions for

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. Rule 36-3.

** The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

several charges arising out of an armed robbery of a credit union. Reviewing the district court's ruling de novo, *see United States v. LaFromboise,* 427 F.3d 680, 683 (9th Cir. 2005), we AFFIRM for the following reasons.

1. Piers contends that his attorney rendered ineffective assistance in his investigation and presentation of the case. To establish an ineffective assistance of counsel claim, Piers must demonstrate both that his counsel's representation was objectively deficient and that the deficiency prejudiced his defense. *Strickland v. Washington,* 466 U.S. 668, 687-88, 692, 104 S. Ct. 2052, 2064-65 (1984). Prejudice exists only if "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. Here, the Government presented overwhelming evidence establishing Piers's guilt of the robbery and weapons charges. Given the strength of the Government's case, none of the alleged errors by Piers's counsel, whether viewed individually or cumulatively, "rendered the result unreliable or the trial fundamentally unfair." *Cooper v. Brown,* 510 F.3d 870, 925 (9th Cir.2007); *see also Hart v. Gomez,* 174 F.3d 1067, 1072 (9th Cir. 1999) (explaining that an attorney's errors are not prejudicial when the evidence against the defendant is overwhelming).

2. Piers additionally contends that his attorney was unconstitutionally deficient in handling a motion to withdraw. Whatever disagreements Piers had

with his counsel were insufficiently serious to support a presumption of prejudice. *See, e.g., Daniels v. Woodford,* 428 F.3d 1181, 1198-99 (9th Cir. 2005) (presuming prejudice when the defendant categorically refused to communicate with the former career-prosecutor who was belatedly appointed to represent him); *United States v. Adelzo-Gonzalez,* 268 F.3d 772, 779-80 (9th Cir. 2001) (finding an irreconcilable conflict with counsel who cursed at his client, threatened to testify against him and "sink him for 105 years," called him a liar, and actively opposed the motion to substitute counsel). Regarding prejudice, the issue is not whether the court would otherwise have appointed substitute counsel, but whether Piers's alleged disputes with his attorney impacted his defense. We find nothing in the record to warrant a conclusion that counsel's failure to withdraw affected Piers's defense.

3. We also agree with the district court in finding no abuse of discretion by the magistrate judge who declined to receive expert testimony offered by Piers in support of his ineffective assistance of counsel claim. *See United States v. Morales,* 108 F.3d 1031, 1035 (9th Cir. 1997) (en banc). The magistrate judge's own ability to assess the factual and legal issues raised by Piers's *Strickland* claim supports exclusion of the proffered testimony. *See Hovey v. Ayers,* 458 F.3d 892, 910-11 (9th Cir. 2006); FED. R. EVID. 702 (permitting expert testimony where it will "assist the trier of fact to understand the evidence or determine a fact in issue"). Thus, the magistrate judge acted properly within his broad discretion pursuant to

FED. R. EVID. 702, and his ruling did not violate due process.

4. Finally, we decline to expand the Certificate of Appealability to include Piers's uncertified issues. Piers has not made the requisite "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), nor raised issues debatable among jurists of reason, *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04 (2000).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM EDWARD PIERS (D-01) RAYMOND LEE HUBBARD (D-02) and DONALD DOUGLAS FRANKLIN (D-03) Defendants	)	
This Order pertains to: WILLIAM EDWARD PIERS (D-01)	)	No. 3:00-cr-0104-HRH

ORDER

Motion to Vacate Judgment

Defendant William Piers moves the court to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255.[1] The motion is opposed by the Government.[2] Piers replied.[3] An evidentiary hearing was

[1] Clerk's Docket No. 203.

[2] Clerk's Docket No. 212.

[3] Clerk's Docket No. 216.

conducted before the assigned United States magistrate judge with respect to Piers' contentions of ineffective assistance of counsel and his claim that the Government breached its duty to provide exculpatory information pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Thereafter the magistrate judge received supplemental briefing from the parties.[4] The magistrate judge issued to the parties and filed a report and recommendation,[5] received objections on behalf of Piers,[6] and then issued and filed a final recommendation.[7] The magistrate judge recommended that the motion to vacate be denied.

The court has now had an opportunity to review the entire record developed with respect to the instant motion. The court has personally reviewed the transcript of the evidentiary hearing conducted before the magistrate judge. Additionally, the court has had available and, in a considerable number of areas, has had recourse to the transcript of the trial of Mr. Piers which was conducted before the undersigned. Having fully informed itself as to Piers' motion, the court now concludes that it must be denied.

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[4] Clerk's Docket No. 249, No. 251, and No. 252.

[5] Clerk's Docket No. 253.

[6] Clerk's Docket No. 258.

[7] Clerk's Docket No. 259.

Case History

Even without recourse to the trial transcript, the court has a very clear recollection of the instant case. It is unusual for bank robbery charges to go to trial, but this one did. It is unusual in this district for bank robberies to involve actual, physical violence to bank employees; but in this instance, Piers bound and gagged tellers. It is unusual for law enforcement authorities to be on the scene of a bank robbery; but in this instance, Piers, although he had inside information about bank operations, triggered at least one silent alarm that alerted authorities who were literally at the back door of the bank as Piers and his driver pulled away from the bank. Moreover, in the ensuing chase, shots were fired at the pursuing police officer, who was so shaken by the experience that he choked up in testifying about it, long after the experience. After changing vehicles and another brief chase, Piers and his driver sought to abandon their vehicle, which became entangled in a chain link fence, but were quickly surrounded and arrested.

This case was as close to one where there is not only no reasonable doubt, but rather no possible doubt as a prosecutor could ever expect to have. Piers and his driver were out of the sight of the police only briefly when they changed vehicles, but there is absolutely no doubt but that the two individuals who drove away from the bank are the same two individuals who were captured shortly after they abandoned their second vehicle.

The procedural history of this case is set forth in the initial report and recommendation of the magistrate judge.[8] Suffice it to say here that Piers was tried and convicted of conspiracy to commit armed credit union robbery in violation of 18 U.S.C. § 371 (Count I), armed credit union robbery in violation of 18 U.S.C. § 2113(a) and (d) (Count II), using a machine gun in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) and (B)(ii) (Count V), and other related charges. He was acquitted as regards a further charge of attempted armed credit union robbery.

Piers appealed his conviction and sentence. On appeal, Piers questioned the court's denial of his trial counsel's motion to withdraw made just before trial, the sufficiency of the evidence with respect to Count V, the court's jury instructions with respect to the machine gun, and sentencing for two Section 924(c) convictions based upon the same weapon. Piers' convictions were affirmed in all respects, but the court was required on remand to merge the Section 924(c) violations because both convictions were based on the same weapon. However, Piers' sentence on the merged weapons offense remained 360 months. This motion to vacate proceedings, pursuant to 28 U.S.C. § 2255, followed in due course.

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[8] Clerk's Docket No. 253 at 2-5.

Objections to Magistrate Judge Proceedings

After the evidentiary hearing had been conducted, but prior to receipt of agreed-upon supplemental briefing, the United States magistrate judge inadvertently and prematurely released his proposed recommendation on Piers' motion to vacate.[9] When the error was called to the magistrate judge's attention, the report was withdrawn, the supplemental briefing received, and the report and recommendation first mentioned above was served and filed. In response to that report and recommendation, Piers contends that the magistrate judge should have recused himself because of the premature release of a recommendation.[10]

The court perceives no basis for requiring recusal by the magistrate judge. It is entirely clear that the first report and recommendation was released inadvertently, but that does not by any measure establish bias, prejudice, or other cause for recusal. In fact, that occurrence probably gave Piers an opportunity that he would not ordinarily have – of knowing what the magistrate judge thought of his motion – which would make it possible for Piers' supplemental briefing to address directly the magistrate judge's preliminary views of the motion to vacate.

The foregoing objection is without merit.

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[9] Clerk's Docket No. 244.

[10] Clerk's Docket No. 258 at 3.

Second, Piers objects to the magistrate judge's report and recommendation because the magistrate judge declined to receive testimony from an expert witness on the subject of trial counsel's alleged ineffective assistance. The authorities that Piers argues are inapposite. *Ainsworth v. Calderon*, 138 F.3d 787, 797 (9th Cir., 1998), upon which Piers relies, does not address the question of a court's discretion to allow or disallow expert evidence with respect to the performance standards placed upon trial counsel by *Strickland v. Washington*, 466 U.S. 668 (1984). Piers fails to discuss the role of Rule 702, Federal Rules of Evidence, in a court's determination of whether or not to receive expert testimony. However, the evidentiary record suggests that Piers' expert witness was prepared to offer testimony with respect to applicable, objective standards of reasonableness with respect to an attorney's performance at trial and to evaluate trial counsel's conduct.[11]

While the court does not rule out the possibility of receiving attorney testimony as to applicable objective standards,[12] the court is of the view that the applicable objective standards to which counsel must adhere can be suitably ascertained by the court from experience and case precedent. Here, we do not deal with subjects as to which the court has neither training nor experience such as medical practice or

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[11] Tr. at 245-56, Clerk's Docket No. 243.

[12] Such testimony would appear to constitute "specialized knowledge" within the ambit of Rule 702.

generally accepted accounting practices. The adequacy of legal representation is a matter with which the court regularly and often deals. The court does not perceive that expert testimony was needed or would have been particularly useful in this case. Expert testimony is admissible where it will "assist the trier of fact to understand the evidence or determine a fact in issue[.]" Fed. R. Evid. 702. Here, there is little disagreement about the facts. Piers did not testify at the evidentiary hearing. Rather, the disagreement about trial counsel's performance flows from the arguments of Piers' present counsel about trial counsel's performance. Thus the court has in substance only trial counsel's own view of his performance and argument from the other side. Under these circumstances, it was within the magistrate judge's discretion to refuse the proffered expert testimony.

The court concurs in the magistrate judge's decision to decline to receive Piers' proffered expert testimony.

Grounds for Relief

Piers' motion to vacate asserts grounds for relief that fall into two general categories:

(1) claims of ineffective assistance by both trial counsel and appellate counsel; and

(2) two other issues:

(a) the district court's failure to *sua sponte* substitute counsel for argument of appointed counsel's motion to withdraw;

(b) a "*Brady*" violation based upon an alleged failure of the Government to disclose part of a plea agreement with co-defendant Hubbard, and a further "*Brady*" violation having to do with the existence of a person named "Adam".

The court will take up first the "other" issues, followed by discussion of the ineffective assistance of counsel issues that are the centerpiece of Piers' motion to vacate.

Other Issues

Failure to Substitute Counsel.[13] Piers faults the district court for not having *sua sponte,* appointed separate counsel for Piers to argue trial counsel's motion to withdraw. The details underlying this issue are set forth by the Ninth Circuit Court of Appeals which evaluated this court's decision to deny trial counsel's motion to withdraw that was made just prior to trial. *United States v. Franklin*, 321 F.3d 1231, 1237-38 (9th Cir. 2003). The circuit court concluded that:

> Piers has not demonstrated that an extensive conflict existed with Butler. The

[13] This matter was addressed by the magistrate judge at Clerk's Docket No. 253 at 26-27.

> main source of Piers' dispute with Butler centered around defense and litigation tactics. While the district court emphasized Butler's competence when ruling on the motion, it also viewed the conflict as one related to "defense tactics." "Litigation tactics are decisions generally left to defense counsel." Considering the context of the dispute, and weighing the three relevant factors, we conclude that the district court did not abuse its discretion in this case.

Id. at 1239 (internal citation omitted). Indeed, the district court did not perceive that there were any significant conflicts of interest between trial counsel and Piers. Had the court believed there was a serious conflict, it would certainly have considered the appointment of separate counsel; but, under the circumstances, that action (which surely would have disrupted the trial calendar for the case) was not taken.

The court concludes that it was under no obligation to *sua sponte* appoint separate counsel to argue Piers' trial counsel's motion to withdraw. The motion to vacate based on the failure to substitute counsel is denied.

"Brady" Violations. Piers alleges that the Government violated the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding from the defense a part of co-defendant Hubbard's plea agreement by which the Government promised that it would not investigate Hubbard's sister. Piers also

accuses the Government of withholding exculpatory information with respect to an unidentified person, referred to as "Adam" throughout these proceedings. The magistrate judge has found that Piers produced no evidence to support either of these contentions;[14] and, on the basis of its review of the evidentiary hearing transcript, the court so finds also.

The motion to vacate based on *Brady* claims is denied.

Ineffective Assistance of Counsel

The court turns now to the centerpiece of Piers' motion to vacate: claims that both his trial counsel and sentencing and appeal counsel failed to provide the requisite level of legal assistance. The court turns first to claims that the performance of trial counsel was inadequate.

Standard for Ineffective Assistance of Counsel. Claims of ineffective assistance of counsel are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). As discussed in more detail by the magistrate judge in his recommendation,[15] a claim of ineffective assistance is established by showing that counsel's performance was "so deficient that it fell below an 'objective standard of reasonableness.'" *Silva v.*

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[14] This subject is addressed in the magistrate judge's initial report and, recommendation at 27-29, Clerk's Docket No. 253.

[15] *Id.* at 6-8.

Woodford, 279 F.3d 825, 836 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 688). Prejudice must also be demonstrated. *Strickland*, 466 U.S. at 693. Judicial scrutiny is "highly deferential" and the court must endeavor "to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.])" *Id.* In this regard, the court adopts the magistrate judge's more expansive discussion of the standard for demonstrating ineffective assistance of counsel, including that discussion which addresses specifically ineffective assistance claims against appeals counsel.[16]

Factual Findings

The report of the magistrate judge contains an extensive recitation of what took place at the evidentiary hearing conducted with respect to Piers' motion to vacate. The court adopts those findings[17] and incorporates them into this order for purposes of convenience. However, the court has also relied heavily upon its own review of the transcript of the evidentiary hearing in evaluating Piers' claims of ineffective assistance of counsel, and has, where deemed appropriate, supplemented the magistrate

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[16] *Id.* at 8.

[17] *Id.* at 9-17.

judge's summary of the results of the evidentiary hearing.

However, one matter (already mentioned by the court) is worthy of repetition here. Although Piers, as the moving party, has the burden of proof (*Strickland,* 466 U.S. at 687) with respect to his claims of ineffective assistance of counsel, he did not testify at the evidentiary hearing. As a consequence, the court is left with precious little more than trial counsel's testimony as regards his own performance as the basis for fact-finding about that performance.

Ineffective Assistance of Trial Counsel

Piers moves to vacate his conviction and judgment based upon multiple allegations of ineffective assistance of his trial counsel. The court addresses in roughly chronological order Piers' many allegations of ineffective assistance.

Motion to Withdraw.[18] Piers challenged the district court's handling of trial counsel's motion to withdraw in his direct appeal; and, as discussed

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[18] The recommendation of the magistrate judge commences its discussion of the allegations of ineffective assistance made by Piers with respect to trial counsel with an extensive review of the district court's handling of trial counsel's motion to withdraw. Initial Report and Recommendation at 29-40, Clerk's Docket No. 253. The court has no disagreement with the magistrate judge's foregoing presentation and incorporates the same herein to the extent that it may provide readers with relevant background to what is at issue now.

above, the circuit court affirmed this court's denial of the motion to withdraw. The evidentiary hearing did not develop any new evidence that would cast doubt upon the court's decision to deny trial counsel's motion to withdraw. What now remains are questions of whether or not trial counsel rendered ineffective assistance in his actual representation of Piers in the trial of his case.

Failure to Investigate. Piers contends that, he was ineffectively assisted by counsel for the reason that trial counsel did not sufficiently investigate the possibility that "Adam" was both the person who entered and robbed the credit union and the shooter. In general, the court adopts the magistrate judge's discussion of this issue.[19] On the basis of its review of the testimony taken at the evidentiary hearing, as well as its knowledge of the trial of this case, the court finds that trial counsel's investigation of the possible involvement of "Adam" was adequate. Trial counsel made the appropriate inquiries. Piers, whom the evidence suggests must have known "Adam," never came forward before trial nor during the evidentiary hearing with any information as to who "Adam" was or where he might be located. Moreover, the court concurs in the magistrate judge's conclusion that Piers has not demonstrated any prejudice for purposes of the *Strickland* analysis. The evidence was

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[19] Initial Report and Recommendation at 40-45, Clerk's Docket No. 253.

overwhelming that Piers was the person who entered the credit union, robbed it, escaped in a van parked behind the credit union, and shot at a pursuing police officer, only to be apprehended shortly thereafter in a second getaway car amidst all sorts of indicia of his direct involvement in the crime.

Failure to move to suppress. Piers contends that trial counsel rendered ineffective assistance by failing to move to suppress Piers' post-arrest statement to Officer Bloodgood. The court adopts the magistrate judge's discussion of this issue.[20] The court concludes, as did the magistrate judge, that a motion to suppress in this instance would have been futile. An attorney does not render ineffective assistance by failing to make a motion that he reasonably believes to be meritless. *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir.), *cert. denied*, 513 U.S. 1001 (1994). Here also, there has been no showing of prejudice for *Strickland* analysis purposes.

Chance of Venue. Piers contends that trial counsel provided ineffective assistance when he did not move for a change of venue. The court adopts the magistrate judge's discussion of this issue.[21] Piers has made no showing that there was the kind of intense, lengthy, and/or accusatory publicity about the credit union robbery either at the time of Piers' arrest or in close proximity to the time of trial. Defendant has

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[20] *Id.* at 45-47.

[21] *Id.* at 49-50.

made no showing that trial of this case was preceded by the kind of publicity, "'saturated with prejudicial and inflammatory media publicity about the crime,'" which can render a trial unfair. *United States v. Collins,* 109 F.3d 1413, 1416 (9th Cir. 1997) (quoting *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir. 1988).

Piers has not demonstrated that a motion for change of venue would have had any reasonable possibility of success. Moreover, in examining the transcript of jury selection in this case,[22] the court is satisfied that there was no prejudice to Piers. The jury panel was specifically questioned about pretrial publicity[23] as well as any juror connections with the credit union that was robbed.[24] The court concludes that trial counsel's decision not to file a motion for change of venue did not constitute ineffective assistance, nor has there been any showing of prejudice flowing from the motion not being filed.

Opening Statement. Trial counsel for Piers elected not to make an opening statement following that of the Government; and, after completion of the Government's case, again opted not to make an opening statement. Also, Piers wanted a statement that he had written read into the record as an opening statement, and trial counsel advised against doing so. The court adopts the magistrate judge's discussion of this

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[22] Tr. 1 at 13-116, Clerk's Docket No. 131.

[23] *Id.* at 22-39 and 73-81.

[24] *Id.* at 22-39.

subject.[25] The decision when and whether to make an opening statement is a classic example of the kind of strategic, tactical decision that falls within the sound discretion of counsel. *United States v. Rodriguez-Ramirez*, 777 F.2d 454, 458 (9th Cir. 1985). Piers has not advanced any persuasive reason why the court should find trial counsel's decision not to make an opening statement to have been ineffective assistance. Contrary to what Piers suggests, trial counsel did not assure the jury that he would be making an opening statement sometime. Piers has shown neither ineffective assistance nor prejudice for purposes of the *Strickland* analysis.

Failure to Object to Evidence. Piers contends that trial counsel rendered ineffective assistance when he failed to object to testimony describing the commotion that resulted from efforts of police officers to seal off a considerable area surrounding the credit union robbery site, which area happened to be in close proximity to a school. The court adopts the magistrate judge's discussion of this issue.[26] Based upon its review of both the evidentiary hearing transcript and trial testimony, the court finds that the testimony in question was by no means inflammatory. It was presented in an unobjectionable fashion as a part of law enforcement's description of the circumstances

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[25] Initial Report and Recommendation at 51-52, Clerk's Docket No. 253.

[26] *Id*. at 48-49.

leading to Piers' arrest. Here, too, there has been no showing of inadequate performance by trial counsel, nor prejudice for purposes of the *Strickland* analysis.

Piers also contends that trial counsel provided ineffective assistance by not objecting to the introduction of phony CIA identification badges and documents bearing the names of Piers and a co-defendant. The court adopts the magistrate judge's discussion of this issue.[27] The CIA identification badges were probably of little, if any, relevance. The documents bearing the names of Piers and the co-defendant were relevant because they tended to support the involvement of both Piers and the co-defendant in a conspiracy to commit bank robbery. Where there are close questions as to relevancy, trial counsel are entitled to considerable latitude in deciding whether or not to object and risk drawing greater attention to certain evidence by losing the objection, as opposed to remaining silent and having the evidence in question fade into the background.

Piers has not demonstrated ineffective assistance flowing from trial counsel's decisions on objections, nor has he demonstrated any unfair prejudice for *Strickland* purposes.

Testimony of Steven Payne. Law enforcement seized Piers' computer and transferred data therefrom to 28 compact discs. Out of the presence of the

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[27] *Id.* at 53.

jury, the court ruled that the Government might present only certain evidence from those discs. Piers now contends that trial counsel provided ineffective assistance because he did not object when the Government's forensic expert testified to having transferred material from Piers' computer onto 28 discs. The court adopts the magistrate judge's discussion of this issue.[28] As observed by the magistrate judge, the court did not expressly preclude the Government from offering testimony as to the quantity of material transferred from Piers' computer onto discs. Thus trial counsel was not confronted with a situation of the Government going outside the court's ruling as regards the testimony in question. Rather, this is another instance of testimony of only marginal relevance, as to which an objection might or might not have been sustained. Trial counsel is entitled to considerable latitude in deciding whether or not to object to such testimony.

Piers has not demonstrated that the failure to object to mention of the 28 discs amounted to ineffective assistance, nor has he shown prejudice from that testimony for purposes of the *Strickland* analysis.

Use of Mannequin. Following Piers' arrest, law enforcement officers gathered up at the scene, among other things, a number of items of clothing that were shown to be of the type worn by the bank robber. They were not found in one place; but for purposes of

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[28] *Id.* at 53-54.

trial, were placed upon a mannequin and displayed to the jury. Piers contends that trial counsel rendered ineffective assistance by failing to object to the Government's use of a mannequin, displaying the items collectively. The court adopts the magistrate judge's discussion of this issue.[29]

The jury was not in any way misled by the Government's use of a mannequin. It is quite improbable that an objection to use of the mannequin would have been sustained. Placing all of the clothing found at the scene together on the mannequin would properly assist the jury in evaluating testimony about the robber's appearance. Piers advances no authority suggesting otherwise, and the court perceives no unfair prejudice whatever from the Government's display of clothing items – all of which were separately admissible – on a mannequin.

The court perceives neither fault on the part of trial counsel nor prejudice for purposes of the *Strickland* analysis.

Cross-Examination of Reeder. Reeder was the police officer who was shot at by the bank robber. He testified that he believed the shooter had a goatee and was wearing a faded Carhartt jacket. Piers argues that this description fit the getaway car driver, not Piers. The court assumes, for purposes of this discussion, that Piers is correct in his view of

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[29] *Id.* at 55.

Reeder's description of the shooter. Piers faults trial counsel for not cross-examining Reeder beyond obtaining a statement that he (Reeder) never actually saw the person who fired at his patrol car. The court adopts the magistrate judge's discussion of this issue.[30]

This is another example of the type of matter which must by and large be left to the discretion and intuition of trial counsel. The examination of Reeder, as far as it went and viewed in isolation, raised some uncertainty as to who the shooter was. This is one of those occasions where pressing on with vigorous cross-examination could have been very dangerous, for it might have propelled Reeder into recalling and relating further information that would significantly undercut the potentially helpful statements that he had made.

Piers has not demonstrated that trial counsel's decision as to how to cross-examine Officer Reeder amounted to ineffective assistance for purposes of *Strickland*. Indeed, pressing on in this instance rather than stopping might have been the cause of prejudice to Piers' case even though doing so would, in the view of the court, also have been within counsel's appropriate discretion as regards how best to defend Piers.

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[30] *Id.* at 56-57.

Cross-examination of Shem. The rifle that was used to shoot at Officer Reeder from the rear of the bank robbers' escape vehicle was originally manufactured as a Norinco semiautomatic assault rifle. Shem testified that the rifle had been modified to allow it to be fired either as a semiautomatic or as a full automatic. Piers argues that trial counsel provided ineffective assistance in his cross-examination of Shem because he did not inquire whether the rifle, as fired, was in the automatic or semiautomatic mode.

The court adopts the magistrate judge's discussion of this issue.[31] The question that Piers would have had trial counsel ask on cross-examination could easily have proven dangerous. Piers posits that Shem would have been uncertain about whether the rifle was fired as an automatic or semiautomatic. That is not necessarily so. It strikes the court as entirely possible, if not probable, that Shem, as an expert witness, would have responded: "Of course Piers would have known. He could tell by the sound and the action of the rifle whether it was or was not firing in the automatic or semiautomatic mode." Trial counsel's decision not to make such an inquiry was a prudent decision, not an incompetent decision.

The extent of cross-examination is properly left to trial counsel's sound discretion, which was not abused in this instance. There is no fault here for purposes of the *Strickland* analysis.

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[31] *Id.* at 57-58.

Jury Instruction about Weapon. Piers contends that trial counsel rendered ineffective assistance because he did not request a jury instruction requiring that the jury find beyond a reasonable doubt that Piers knew that the modified Norinco weapon could be operated as automatic. The court adopts the magistrate judge's discussion of this issue.[32]

The court is somewhat mystified by Piers' argument with respect to its jury instruction detailing the elements of the crime charged in Count V (use or possession of a machine gun). The court's instruction as given told the jurors that as a second element, they must find beyond a reasonable doubt that:

> The defendant *knowingly* used or carried a machine gun during and in relation to the crime charged in Count 2 or *knowingly* possessed a machine gun in furtherance of the crime charged in Count 2, with all of you agreeing as to which alternate has been proved.[33] [Emphasis supplied.]

Thus, the trial jury was in fact given the instruction that Piers now contends trial counsel should have requested but did not. Piers has not demonstrated that trial counsel failed to request an instruction that should have been given as regards Count V but was not given.

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[32] Initial Report and Recommendation at 58-61, Clerk's Docket No. 253.

[33] Tr. 5 at 75, lns. 14-18, Clerk's Docket No. 135.

Character Witnesses. Trial counsel was provided in advance of trial information about the potential character witnesses who could testify on Piers' behalf. Trial counsel decided not to call any such witnesses. Piers contends that trial counsel provided ineffective assistance by not calling character witnesses. The court adopts the magistrate judge's discussion of this issue.[34]

The decision of whether or not to call character witnesses is another matter falling within the sound discretion of trial counsel. It is clear from the evidentiary hearing that trial counsel considered calling character witnesses, but determined for strategic reasons (because calling character witnesses would put Piers' character in issue and thereby open opportunities for the Government) not to call any character witnesses.

There was no ineffective assistance in trial counsel's decision not to call character witnesses for purposes of the *Strickland* analysis.

Defendant Not Testifying. Piers argues that he had a strong desire to testify and that trial counsel refused to allow him to testify. The court adopts the magistrate judge's discussion of this issue.[35]

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[34] Initial Report and Recommendation at 61-62, Clerk's Docket No. 253.

[35] *Id.* at 62-63.

Piers has offered no evidence whatever in support of this contention. Trial counsel for the Government and Piers addressed this issue in open court out of the presence of the jury and in Piers' presence. Piers' counsel represented that he had recommended against Piers taking the stand.[36] Piers did not disagree.

The Government's case against Piers was so extensive and so solid that it is highly probable that Piers would only have helped to convict himself had he taken the stand. Under the circumstances, Piers would either have appeared to fabricate and/or lie on the one hand or, on the other hand, would have made damaging concessions. Piers has not established that, at the time of trial, he was insistent upon testifying, nor has he demonstrated that trial counsel's advice that he not testify was imprudent. Piers has not come forward with evidence which, had it been presented at trial, would have likely led to a different result.

Piers has not established either ineffective assistance or prejudice for purposes of the *Strickland* analysis.

Voice Evidence. Piers contends that his trial counsel's decision not to offer evidence of a distinctive voice constituted ineffective assistance. The court

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[36] Tr. 4 at 113, lns. 2-7, Clerk's Docket No. 134; *see also* Evidentiary Hearing Transcript at 188-89, Clerk's Docket No. 242.

adopts the magistrate judge's discussion of this issue.[37]

Piers has come forward with no evidence suggesting that at the time of trial voice evidence which would have helped his case could have been developed. Indeed, it is doubtful that such testimony would have passed muster under Rule 702, Federal Rules of Evidence. Unlike fingerprint evidence which has long been used and was employed in this case to place Piers in the getaway van, use of voice comparison evidence has been rejected by this court (in the *Exxon Valdez* litigation) because it did not meet the standards of Rule 702.

The court concludes that the failure to offer voice evidence in this case was not ineffective assistance for purposes of *Strickland*.

Jury Instructions/Witness Believability. Piers argues that trial counsel provided ineffective assistance because the jury was not instructed to view the testimony of the co-defendant, getaway driver's testimony with distrust. The jury was instructed that it "should consider this witness' testimony with great caution, giving it the weight you feel it deserves."[38] On direct appeal, the court's jury instructions on the

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[37] Initial Report and Recommendation at 64, Clerk's Docket No. 253.

[38] Tr. 5 at 65, Ins. 2-3, Clerk's Docket No. 135.

foregoing subject were taken up. The court of appeals expressly found that:

> Given the instructions as a whole, the district court did not abuse its discretion by refusing to further instruct the jury that [the van driver) was an accomplice of Piers and that [the jury] "should consider [the van driver's] testimony with greater caution than that of other witnesses." The district court accomplished the same objective with the instructions provided.

Franklin, 321 F.3d at 1241.

Piers of course had an opportunity to make on direct appeal the argument that he makes now. Judging from the circuit court's above quoted holding, the present argument or one very much like it was made and rejected. Assuming that Piers' present argument was not made on appeal, the court acknowledges that there may be some slight difference between telling the jury that testimony should be viewed with "great caution" as opposed to "with distrust." The latter may be marginally stronger. Piers has come forward with no authority suggesting that it was error to choose the instruction given as opposed to what Piers would now have had his trial counsel propose.

The court concludes that trial counsel did not provide ineffective assistance by not arguing for or taking exception to the court's choice of instructions that did not include the "with distrust" formulation.

The court perceives no plausible argument that a different result would have ensued had the court told the jury to view the van driver's testimony with distrust rather than telling them to view it with great caution.

Motion for Judgment of Acquittal. Piers argues that trial counsel should have moved for judgment of acquittal pursuant to Rule 29, Federal Rules of Criminal Procedure. The focus of the argument is that counsel should have sought a judgment of dismissal based upon the sufficiency of evidence as to the identity of the defendant who shot at officer Reeder. The court adopts the magistrate judge's discussion of this issue.[39]

In considering a motion for judgment of acquittal under Rule 29, the court must view the evidence in the light most favorable to the Government. Taking that view of the evidence, a motion for judgment of acquittal in this case would have been a total waste of time. There was both physical evidence (fingerprints) and testimonial evidence (testimony from the van driver) that it was Piers who was shooting at Officer Reeder.

It is not ineffective assistance for counsel to recognize that a Rule 29 motion would be hopeless on the facts of this case. Piers has demonstrated neither

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[39] Initial Report and Recommendation at 65, Clerk's Docket No. 253.

ineffective assistance nor prejudice for purposes of the *Strickland* analysis.

Overall Defense Strategy. Piers contends that trial counsel failed to develop a coherent theory of defense. The court adopts the magistrate judge's discussion of this issue.[40]

At the evidentiary hearing, trial counsel explained his theory of defending the case. There is no countervailing evidence. Trial counsel's approach to the case has not been shown to have been deficient in any respect. The strength of the Government's case left defense counsel very little maneuvering room within which to operate. Trial counsel prudently chose to focus attention upon the most serious charge – using or possessing a machine gun.

In the context of the foregoing argument, Piers also faults trial counsel for not having made various arguments in closing and for conceding guilt on the conspiracy counts. Trial counsel's decision as to how best to argue the case is a tactical one. Piers has not demonstrated that trial counsel's closing argument was so ineffectual or unfocused as to amount to ineffective assistance. As regards the alleged confession with respect to conspiracy counts, Piers overstates trial counsel's position. Trial counsel did not admit guilt for Piers as to both conspiracy counts. Rather, he said, "[y]es, ladies and gentlemen, my

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[40] *Id.* at 66-67.

client was involved in a conspiracy to take money from Credit Union 1 Dimond branch."[41]

The court concludes that Piers has failed to show that his attorney made a tactical error here that was so serious that it had the effect of depriving Piers of constitutionally guaranteed counsel. An attorney may constitutionally acknowledge before the jury his client's shortcomings in order to build credibility with the jury and persuade it to focus on the relevant issues in the case. *See Yarborough v. Gentry,* 540 U.S. 1, 11 (2003). This is not a case where counsel conceded guilt as to the only important matter before the jury. Rather, trial counsel conceded what the Government had proved, beyond any possible doubt, in the rational, tactical hope of focusing the jury's attention upon the more serious charge of possessing or using a machine gun.

Neither the decision to concede a conspiracy nor trial counsel's overall trial strategy amounted to ineffective assistance, nor has Piers demonstrated prejudice for purposes of the *Strickland* analysis.

The motion to vacate based upon allegations of ineffective assistance by trial counsel is denied.

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[41] Tr. 5 at 33, lns. 17-18, Clerk's Docket No. 135.

Ineffective Assistance of
Sentencing and Appeal Counsel

Piers was represented by new counsel for sentencing and on appeal. Piers alleges that his new attorney also provided' ineffective assistance both at sentencing and on appeal. With some variation in detail discussed by the magistrate judge,[42] *Strickland* has equal application to appeal counsel.

Apprendi Violation. Based upon *Apprendi v. New Jersey,* 530 U.S. 466 (2000), Piers contends that new counsel representing him at sentencing failed to provide effective assistance by not arguing against certain sentencing factors found by the court (not a jury). The report and recommendation of the magistrate judge addresses this issue at length.[43]

Piers was first sentenced on August 10, 2001.[44] An amended judgment was entered as a consequence of the Ninth Circuit Court appeal on May 12, 2003.[45] It was not until *Blakely v. Washington,* 542 U.S. 296, 303-04 (2004), that the Supreme Court first signaled that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." It was of course still

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[42] Initial Report and Recommendation at 8, Clerk's Docket No. 253.

[43] *Id.* at 17-21.

[44] Clerk's Docket No. 147.

[45] Clerk's Docket No. 188.

later in 2004 that the Ninth Circuit Court of Appeals, in *United States v. Ameline,* 376 F.3d 967, 974 (9th 2004), held that *Blakely* applied to United States Sentencing Commission guidelines. Thus, as concluded by the magistrate judge, at the time of imposition of sentence on Piers, *Apprendi* did not apply to the United States Sentencing Commission guidelines. Accordingly, there is no *Apprendi* or other like error in sentencing in this case. It necessarily follows that there was no ineffective assistance of counsel in the foregoing regard on the part of counsel representing Piers at sentencing. As the magistrate judge observed, *Strickland* does not require that counsel be clairvoyant.

Piers also contends that his appellate counsel provided ineffective assistance for failure to raise the *Apprendi* issue. Piers' direct appeal was briefed prior to January 2003, and was argued to the Ninth Circuit Court of Appeals on January 6, 2003. The circuit decision was rendered on March 17, 2003. For the same reason that sentencing counsel was not required to anticipate *Blakely* and *Ameline,* counsel taking a direct appeal in 2003 was not required to anticipate the *Blakely* and *Ameline* decisions of 2004. Therefore, appellate counsel did not provide ineffective assistance to Piers when *Apprendi* was not raised before the circuit court.

Piers makes a second ineffective assistance of counsel contention with respect to new counsel who assisted him at sentencing. Piers contends that counsel failed to argue for downward departures.

In what is perhaps the most bizarre argument made in support of the instant motion to vacate, it is contended that sentencing counsel should have sought a downward departure based upon a showing of compassion for the life of a bank teller whom Piers had tied up because Piers had taped just her mouth instead of taping her nose and mouth such that she would have suffocated. Following this preposterous argument to its logical conclusion, the magistrate judge appropriately asked the rhetorical question: "[s]hould [counsel] have argued for a downward departure because Piers did not shoot the teller?"[46] Piers' argument is insensitive at best. Not surprisingly, Piers makes no reference to any guideline or other authority that would support the proposition that a defendant who "refrains" from causing greater injury to a victim should receive a downward adjustment of his guideline offense level. Counsel's "failure" to make the foregoing argument was most certainly not ineffective assistance.

Piers also contends that his appeal counsel rendered ineffective assistance because he did not present to the Ninth Circuit Court of Appeals an argument that his trial counsel had an irreconcilable conflict and should have been relieved. The recommendation of the magistrate judge discusses this subject at some length,[47] and concludes that Piers'

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[46] Initial Report and Recommendation at 21-22, Clerk's Docket No. 253.

[47] *Id.* at 22-24.

evidence does not support the kind of conflict which he claims to have existed between him and trial counsel. The magistrate judge concludes there was no ineffective assistance of counsel. The court adopts the magistrate judge's analysis, but would take it one step further. As quoted hereinabove at length, the circuit court, in deciding Piers' direct appeal (under the heading "substitution of counsel/extent of conflict"), expressly dealt with the contention now being made. The court held that Piers had not demonstrated the existence of an "extensive conflict" with trial counsel. *Franklin,* 321 F.3d at 1239.

This court views the foregoing holding as dispositive of the present issue. The circuit court expressly determined that there was no irreconcilable conflict between trial counsel and Piers. Thus, what Piers now argues his appeal attorney failed to do was in fact raised to the court of appeals and was decided. The present claim of ineffective assistance by appeal counsel is without merit.

Finally, Piers contends that appellate counsel rendered ineffective assistance when he failed to raise on direct appeal trial counsel's alleged concession of guilt on two conspiracy counts. As discussed above, trial counsel did not expressly confess guilt as to both conspiracies. He conceded that Piers was "involved in a conspiracy[.]"[48] The court has concluded

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[48] Tr. 5 at 33, lns. 17-18, Clerk's Docket No. 135.

that this was a tactical decision which trial counsel could properly make in this case.

For similar tactical reasons, appellate counsel could prudently determine not to question trial counsel's tactical decision about conceding one count in order to concentrate on more likely prospects for reversal on appeal. Appeal counsel did not provide ineffective assistance by his separate decision to not question trial counsel's tactical decision.

Of equal importance here is the fact that this argument, like others, focuses only upon a claimed lapse on the part of counsel and ignores the obligation to demonstrate prejudice. The Government's evidence of Piers' involvement in a conspiracy to commit bank robbery was overwhelming. On the facts put before the trial jury, there was, in the opinion of the court, no possibility whatever of Piers avoiding a conviction on the conspiracy to commit credit union robbery charge. Piers has not been prejudiced by appeal counsel's tactical decision. Moreover, as the magistrate judge points out, the issue of trial counsel's confession as to Count I was a tactical decision susceptible to review on motion to vacate, and that review has taken place above. Hence, there was no prejudice if the issue was not raised on appeal.

The motion to vacate based upon allegations of ineffective assistance by sentencing and appeal counsel is denied.

Conclusion

Piers has not demonstrated that the performance of trial, sentencing, or appeal counsel fell below the standard demanded by *Strickland,* nor has he demonstrated prejudice for purposes of *Strickland.* As to the other issues raised by Piers, he has not demonstrated a constitutional, statutory, or other legal ground for avoiding the convictions and sentence for conspiracy to commit armed credit union robbery, armed credit union robbery, or using or carrying a machine gun during and in relation to a crime of violence.

Piers' motion to vacate is denied.

DATED at Anchorage, Alaska, this 15th day of November, 2006.

/s/ H. Russell Holland
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM EDWARD PIERS (D-01) RAYMOND LEE HUBBARD, II (D-02) and DONALD DOUGLAS FRANKLIN, JR. (D-03) Defendants.	) No.) 3:00-cr-0104-HRH
This Order pertains to: WILLIAM EDWARD PIERS (D-01)	

ORDER

Motion to Alter or Amend Judgment[1]

Pursuant to Rule 59(e), Federal Rules of Civil Procedure, defendant Piers moves the court to reconsider, alter, and amend its order of November 16, 2006,[2] and judgment[3] denying a motion to vacate

[1] Clerk's Docket No. 264.

[2] Clerk's Docket No. 260.

[3] Clerk's Docket No. 261.

conviction and sentence.[4] The motion is unopposed by the Government, probably because the Government viewed the instant motion as one subject to D. Ak. L.R. 59.1 which proscribes responses as to motions for reconsideration without an invitation from the court. Although characterized as a motion to alter or amend the judgment in this case, the instant motion really is one for reconsideration of the court's November 2006 order.

Although defendant suggests that the court has "overlooked" multiple aspects of his earlier motion to vacate, the court is unpersuaded that it has failed to consider the substance of any of defendant's arguments. The motion to alter or amend the court's judgment and to reconsider its order of November 16, 2006, is denied.

DATED at Anchorage, Alaska, this 25th day of January, 2007.

/s/ H. Russell Holland
United States District Judge

[4] Clerk's Docket No. 203.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA Plaintiff, vs. WILLIAM EDWARD PIERS, RAYMOND LEE HUBBARD, II, DONALD DOUGLAS FRANKLIN, Defendants.	A00-104 CR (HRH) **3:00-cr-00104-01-HRH-JDR** **FINAL RECOMMENDATION REGARDING MOTION TO VACATE** (Docket No. 203) (William Edward Piers)

Objections by defendant **William Piers** to the Recommendation filed April 11, 2006 (Docket No. 258) have been reviewed by the magistrate judge. The government did not file a reply. Upon due consideration of the objections and pleadings herein the magistrate judge declines to modify the Recommendation that the Motion to Vacate be denied. A few comments on the objections appear appropriate.

Piers objects to the denial of his opportunity to present at the evidentiary hearing an expert witness on the subject of the reasonable standard of care for a criminal defense attorney. Piers cites *Ainsworth v. Calderon*, 138 F.3d 787, 797 (9th Cir. 1998). In *Ainsworth*, the Ninth Circuit Court of Appeals found no abuse of discretion in the district court's ruling to admit expert testimony on the question of ineffective

assistance of counsel. The state had contended that the district court abused its discretion. The *Ainsworth* court stated that "[r]egardless of whether the district court should have admitted and considered the two attorneys' sworn declarations as being merely additional argument rather than expert opinions, the state's contention goes to far." *Id.* at 791. The appellate court did not address the district court's discretion to allow or disallow the expert evidence addressing the *Strickland* standard as proposed by Piers.[1]

Piers persists in arguing that the magistrate judge should have recused himself after issuing a premature recommendation. Piers cites no case authority for this objection. As stated elsewhere in the record the magistrate judge issued an initial recommendation prematurely because counsel for Piers had obtained an unusually long time period to file a written summation following the evidentiary hearing. In the typical habeas case before this court summation would have been made at the evidentiary hea.ing or shortly thereafter. The initial recommendation was withdrawn when the error was called to the court's attention. Rather than prejudice Mr. Piers the prematurely filed recommendation gave him the added benefit of addressing the arguments and issues in light of the court's magistrate judge's proposed findings of fact and conclusions of law.

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

Mr. Piers's arguments in support of his objections to the factual findings and legal conclusions have already been addressed in a lengthy recommendation and no further comment is deemed necessary. The Motion to Vacate is now referred to the assigned district judge for his determination.

DATED this 5th of June, 2006, at Anchorage, Alaska.

/s/ John D. Roberts
JOHN D. ROBERTS
United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA

Plaintiff,

vs.

WILLIAM EDWARD PIERS, RAYMOND LEE HUBBARD, II, DONALD DOUGLAS FRANKLIN,

Defendants.

A00-104 CR (HRH)
3:00-cr-00104-HRH-JDR

RECOMMENDATION REGARDING MOTION TO VACATE

(Docket No. 203)
(William Edward Piers)

Defendant **William Piers** moves the court to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255. Docket No. 203. The grounds for relief are summarized on page. 5. The motion is opposed by the government. Docket No. 212. Piers filed a reply. Docket No. 216. An evidentiary hearing was conducted on the petition as to certain claims of ineffective assistance of counsel and allegations that the government breached its duty to provide exculpatory information to the defendant pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963). A Recommendation was prematurely filed (Docket No. 204) and withdrawn. Defendant filed his supplemental briefing at Docket No. 247, 250; the government's supplemental opposition was filed at Docket No. 251. The defendant filed a reply to the government's supplemental opposition at Docket No. 252. Upon due consideration of the evidence adduced at the

evidentiary hearing and the arguments of counsel and record herein ***the magistrate judge recommends that the court deny the motion to vacate, adopting findings of facts and conclusions of law as set forth below.***

Procedural History

William Piers was indicted by the Federal Grand Jury and charged with criminal offenses relating to a June 27, 2000 armed robbery of the Credit Union One in Anchorage, Alaska. Count 1 charged Piers, and co-defendants Donald Douglas Franklin and Raymond Hubbard with conspiracy to commit armed credit union robbery in violation of 18 U.S.C. § 371; Count 2 charged all three defendants with armed credit union robbery in violation of 18 U.S.C. § 2113(a) & (d); Count 3 charged all three defendants with conspiracy to use or possess a firearm in relation to a crime in violence in violation of 18 U.S.C. § 924(c)(1)(a) and 18 U.S.C. § 924(o); Count 4 charged Piers and Hubbard with carrying a semi-automatic assault weapon in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) & (B)(i); Count 5 charged Piers alone with using a machine gun in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) & (B)(ii); Count 6 charged Piers with possessing a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k); and Count 7 charged Piers and Franklin with attempted armed credit union robbery in violation of 18 U.S.C. § 2113(a) & (d). All of the charges except Count 7 related to events occurring on

or about June 27, 2000. Piers entered a plea of not guilty. He was represented at trial by retained counsel Rex Butler.[1]

Six days prior to trial, on January 30, 2001, Mr. Butler moved to withdraw as counsel for Piers. The U.S. District Court held an ex parte hearing on January 31, 2001 and denied the motion. On February 9, 2001 after jury trial before the Honorable H. Russel Holland, Piers was convicted of the first six counts. He did not testify at trial. Piers was acquitted on Count 7, attempted armed credit union robbery. *See* Docket No, 188.

Piers moved for substitution of counsel on April 20, 2001. Doc. 106. Attorneys Donald B. Marks and Fay Arfa appeared for Piers. Butler's motion to withdraw, doc. 112, was granted on May 23, 2001. Doc, 115. By motion and order Piers' sentencing was continued to August 3, 2001, and then to August 9, 2001. *See*, Docs. 114, 116.

On August 9, 2001, the District Court sentenced Piers to 468-months in federal prison. He was sentenced to 60-months on Counts 1 and 6, and 108-months on Counts 2 and 3, to be served concurrently. He was also sentenced to a 120-months on Count 4, and 360 months on Count 5, to be served concurrently. The

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[1] On November 8, 2000 before Judge H. Russel Holland, Hubbard pled guilty to Count 4 of the Superseding Indictment that contained an allegation of violation of 18 U.S.C. § 924(c)(1)(A) and (B).

term imposed for Counts 1, 2, 3 and 6 was made consecutive to the term imposed for Counts 4 and 5. During sentencing Piers was represented by attorney Donald Marks.

Piers appealed his conviction. Docket No. 145A. The Ninth Circuit Court of Appeals affirmed in part and reversed in part. *See* Judgment, Docket No. 189. On appeal Piers was represented by attorneys Donald Marks and Fay Arfa. The Ninth Circuit affirmed Piers' convictions and the term of his sentencing. *See United States v.* [*Franklin*] *Piers,* 321 F.3d 1231 (9th Cir. 2003). Piers raised numerous arguments in his appeal. He appealed the denial of the Sixth Amendment right to counsel based on irreconcilable conflict between Piers and Butler. He challenged the District Court's denial of the motion to withdraw by Butler as counsel. He challenged the sufficiency of the evidence tying him to the automatic weapon in Counts 4 and 5 and to prove that he knew the weapon was capable of being fired as an automatic weapon, and that he fired the machine gun. He claimed the District Court failed to properly instruct the jury that Piers knew the firearm operated as a machine gun. He argued that the trial court should have instructed the jury to determine unanimously whether the weapon was either a semi-automatic or an automatic weapon. He argued that he was denied due process by the trial court failing to issue a unanimity instruction to the jury that the firearm used was an automatic. He argued that the District Court failed to properly instruct the jury regarding accomplices. He argued

that he was denied due process at sentencing when the District Court considered the use of an automatic machine gun in determining the sentence. Finally, he claimed that the accumulative errors of the district court required reversal.

The court of appeals vacated the concurrent sentence imposed on Count 4 but this had no effect on Piers' actual underlying sentence. Piers' Petition for Rehearing and Petition for Rehearing en banc were denied. Docket No. 190. The United States Supreme Court denied Piers' Petition for Writ of Certiorari on October 6, 2003. *Piers v. United States,* 124 S.Ct. 161 (2003).On September 29, 2004 Piers filed a Motion to Vacate within the statutory time limits imposed by 28 U.S.C. § 2255.

Grounds for Relief

The motion to vacate alleges ineffective assistance of counsel rendered by trial attorney Rex Butler, ineffective appellate counsel rendered by Donald Marks and attorney Fay Arfa, denial of due process by the district court when it failed to sua sponte appoint substitute counsel for Butler and at sentencing imposed sentencing enhancement factors based on facts not determined by the jury trial beyond a reasonable doubt. The motion to vacate further alleges that the government violated its duty under *Brady v. Maryland,* 373 U.S. 83 (1963) and its progeny when the government withheld from disclosure part of the plea agreement between the

government and co-defendant Ray Hubbard, namely, the promise that the government would not pursue its investigation against Hubbard's sister Megan. It also alleged that the government withheld exculpatory evidence relating to the existence of a person named "Adam." The ineffective assistance of counsel claims are stated with more particularity in the discussion below.

Standard for Ineffective Assistance of Counsel Claims

Ineffective assistance violates the Sixth Amendment right to the assistance of counsel. Claims are subject to analysis under the two-prong test established in *Strickland v. Washington,* 466 U.S. 668 (1984). A claim of ineffective assistance of counsel on appeal is also evaluated under the same two-part test enumerated in *Strickland. See United States v. Birtle,* 792 F.2d 846 (9th Cir. 1986). The *Strickland* analysis requires that the criminal defendant show not only that his attorney's representation was deficient but also that the attorney's representation prejudiced his cause. *Id.* at 693. The defendant bears the burden of demonstrating that his attorney's performance was "so deficient that it fell below an objective standard of reasonableness." *Silva v. Woodford.*, 279 F.3d 825, 836 (9th Cir. 2002). "Judicial scrutiny of a counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the

conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689. A defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*; *see also Murtishaw v. Woodford,* 255 F.3d 926, 939 (9th Cir. 2001) (Defendant "bears the heavy burden of proving that counsel's assistance was neither reasonable nor the result of sound trial strategy.").

To establish prejudice the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland,* at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome." *Id.* "It is not enough for [a defendant] to show that the errors had some conceivable effect on the outcome of the proceedings. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceedings." *Id.* at 693.

A court need not determine whether counsel's performance was deficient before examining the prejudice suggested by the defendant as a result of the alleged deficiencies. "The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness of counsel claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to

ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Strickland* at 697.

To succeed on a claim of ineffective assistance from appellate counsel, defendant must show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that but for counsel's unprofessional errors, the defendant would have prevailed on appeal. *Miller v. Keeney,* 882 F.2d 1428, 1434 (9th Cir. 1989). An appellate counsel has no obligation to raises every non-frivolous issue requested by defendant. *Jones v. Barnes,* 463 U.S. 745, 751-54 (1983). Appellate counsel's failure to raise an issue on appeal does not constitute ineffective assistance of counsel if counsel had no reasonable likelihood of success in arguing the issue. *Morrison v. Estelle,* 981 F.2d 425, 427-28 (9th Cir. 1992).

Factual Findings from Evidentiary Hearing Regarding Butler's Representation of Piers

Rex Butler has been an attorney since October 1978. His practice includes both private retainers and court appointments in both the federal and state courts. He has represented defendants in a variety of matters ranging from traffic tickets to murder in the first degree. In August 2000 Rex Butler was retained by Mary Hutchison, mother of William Piers to represent Piers in the defense of his case. She paid Butler $7,500.00 and later gave him another $2,500.00

to use for investigation. Her testimony does not reveal when she gave these monies to Butler. Prior to the trial of the case Hutchison orally fired Butler. She later put it in writing. Her testimony at the evidentiary hearing does not indicate when these events occurred. Pursuant to Butler's request for CJA appointment on February 6, 2001, he was appointed by the court to represent Piers. *See* Docket No. 79.[2]

Mary Hutchison discussed the topic of character witnesses with Rex Butler prior to trial. She gave him a list of potential character witnesses. The potential character witnesses included the following: Roger Waldron, a commercial fisherman from Eegik, Alaska, who had known William Piers for three years prior to the trial. He considered they were good friends; Agnus Wigigon, Anchorage, Alaska, Piers' grandmother; Thelma Brinson, a friend of Piers' mother and grandmother; Jessie Barnhill, Anchorage, a friend of Piers' family, David Waldron, Garth Raft, Macon Roberts, and Robin Miller. None of the potential character witnesses were contacted by Butler or anyone on his behalf prior to trial. None of the character witnesses were eye witnesses of the robbery or had been to The Credit Union One prior to the day of the robbery. Each of the character witnesses was prepared to testify that William Piers

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[2] After trial, Donald Marks and Fay Arfa. *See* Docket No. 115.

was not a violent person nor a person likely to fire a machine gun at a police officer.

Mr. Butler did not speak directly with the potential character witnesses because he decided not to place the character of the defendant in issue. Tr. Evidentiary Hearing, p. 118. The attorney was concerned that the evidence might put the government on notice concerning the nature of his character in general and specifically about the propensity to shoot at a police officer as well as opening the door to other evidence seized at the search warrant including "the anarchist cookbook." Tr. Evidentiary Hearing, p. 179.

Six days prior to trial Butler moved the district court to relieve him as trial counsel. The district judge denied the motion. Mr. Butler obtained an acquittal for Mr. Piers on the count charging him with attempt to commit armed robbery of the same credit union on a prior occasion. Mr. Butler obtained discovery from the government that included over a thousand pages of reports, photographs and video tapes, Mr. Butler did not always get along with Piers but he stated that it was not unusual not to see eye-to-eye with a defendant facing such serious charges. The attorney visited Piers at the jail facility more than three times prior to trial.

Mr. Piers asked Butler to conduct an investigation to locate an individual named "Adam" who might have been responsible for some of the criminal conduct including the shooting at the credit union

and firing the machine at Officer Reeder. The discovery from the government did not provide information about an "Adam." Mr. Butler inquired of the U.S. Attorney's office about the name "Adam" coming up. Mr. Butler was not provided enough information or description about "Adam" to locate such a person. Butler questioned whether "Adam" was a figment of his client's imagination or whether Piers was trying to protect his friend by holding back information about his location.

Although the police reports did not reflect Piers being given a *Miranda* warning prior to making an incriminating statement at the arrest scene, Butler did not file a motion to suppress such statements. Mr. Butler did not recall enough of the events to explain why no suppression motion was filed. Mr. Butler was asked at the evidentiary hearing why he had not filed a motion to change venue. After stating he had no independent recollection, Butler explained that the venire pools for federal juries include people residing outside of Anchorage. Usually an attempt is made to empanel a fair and impartial jury by posing questions to the venire when the case has achieved a certain amount of publicity in Anchorage.

Mr. Butler was asked why he did not make an opening statement at the trial. Mr. Butler explained that he did not want to give away any defense. He added that he was concerned that the jury would decide the case prematurely. Mr. Butler believed that the government had overwhelming evidence against Mr. Piers to prove his participation in the events;

thus, his focus was on attempting to avoid a conviction for the offense of using, carrying or possessing a machine gun since it carried a maximum of life with a minimum of thirty years consecutive to any other sentence.

"CIA Badges" were admitted by stipulation at trial as Exhibits 35A and 35B. Although Butler did not consider the badges to be relevant to the case he thought their admissibility were innocuous. Mr. Butler did successfully object to the attempt by the government to introduce evidence seized from Piers's computer, namely, an "anarchist hand book." A video taped interview of Piers in the police holding cell recorded an incriminating statement made by Piers. Piers had asked that the tape recorder be turned off and as the video shows the officer complied although the officer did leave running the video taping with sound. It is not evident from the video tape whether Piers knew or did not know that he was being video taped at the time. No motion to suppress this statement was made. Mr. Butler considered the statement to have been "volunteered", not made in response to questioning by the officers. The attorney was asked at the evidentiary hearing whether the incriminating statements could have been made in response to statements by officers designed to elicit an incriminating statement from the defendant. Mr. Butler explained that he considered the situation different from that governed by *Rhode Island v. Innis*, particularly because of the interplay of the officer wanting to read the *Miranda* warnings to Piers.

Testimony was adduced regarding the existence of a person named "Adam" who may have been responsible for some of the alleged misconduct. Co-defendant Franklin did not match the description of Adam as described by Hubbard. According to Hubbard, Adam was present when Hubbard discussed the plans of the robbery with Piers. At trial Hubbard testified that he assumed that Adam would receive some of the proceeds of the robbery. The federal agents interviewed several persons and reviewed the names in Hubbard's address book that was recovered to see if it shed any light on an "Adam." Agent Henderson initially thought that Adam was a figment of Hubbard's imagination at least as to the alleged participation in the crime. Hubbard initially said the individual was named Jonathan Cutty. Hubbard talked about "Adam" before the Grand Jury as well as during his cross-examination by Rex Butler. The tips did not suggest that Adam was a member of any group which might have helped the officers in tracing his whereabouts.

During the prosecutor's closing argument to the jury the AUSA described where Piers was found in a swamp dressed as a man who entered the bank. Trial Transcript 5-22. The prosecutor added "and he said, I know I've committed a crime and I'm going away for a long time." Later the prosecutor rhetorically asked what part Piers had played. At the time of his arrest Piers stated, "I know I already turned myself into a criminal, but I'd like to do whatever it takes to work

things out. But obviously I'm gone for a long time. And I'll be honest with you."

During the prosecutor's opening statement he described a "man in black" which turned out to be William Piers who was found in a swamp. The prosecutor continued: "Mr. Piers is accompanied to the Anchorage Police Department. He tells Officer – Agent Henderson he knows he's committed a crime." Counsel for Piers at the evidentiary hearing on the § 2255 motion reminded Butler that the prosecutor had referred to Piers's incriminating statement in both his opening and closing to the jury. Butler was asked why he had not filed motions to suppress the statements.

A defendant is entitled to a fair trial but not a perfect one. Many of the questions asked Butler at the evidentiary hearing fall into the category of what "could have been done, not "what was done, and why." For example, Butler could have argued with the district judge that the Ninth Circuit Model Instruction regarding viewing an accomplice's testimony with distrust was wrong. Tr. Evidentiary Hearing, pp. 121-123. Mr. Butler could have stated in his closing argument that co-defendant Franklin had access to Piers's apartment. Tr. Evidentiary Hearing, p.146. Mr. Butler could have filed a motion for judgment of acquittal even though it appeared frivolous to him.

Mr. Butler and the prosecutor stipulated that materials relating to directions on how to obliterate serial numbers found on Piers's computer could come

into evidence. Mr. Butler did not object when Agent Payne talked about 28 CDs of information found on the computer. Tr. Evidentiary Hearing, p.93. Mr. Butler aptly points out that Mr. Payne had not stated that the government received 28 disks of bad information from Piers's computer. Mr. Butler explains his strategy in that regard as not wanting to highlight the volume of information on Piers's computer reviewed by the government.

At trial the government used a mannequin dressed in the clothes supposedly worn by the bank robber even though all the items of clothing were not found together. Counsel for Mr. Piers at the evidentiary hearing asked Butler about an objection that he could have made that the mannequin did not fairly represent the state of the evidence as it was found. Mr. Butler explained that he did not think that an objection would have done anything in terms of aiding the jurors' assessment and he was not sure whether it actually misrepresented the facts. Tr. Evidentiary Hearing, p.96. Mr. Butler concluded that the evidence was not substantially more prejudicial than probative to be excludable under Rule 403 of Federal Rules of Evidence.

Mr. Butler explained his theory of the defense as centered on the argument that Piers was not the shooter. He was trying to narrow the jury's focus on the charge that carried the most jail time because of the overwhelming evidence against Piers on the other charges. Tr. Evidentiary Hearing, pp. 102, 151.

During the defense summation Butler told the jury that his client was "involved" in a conspiracy to take money from Credit Union 1, Diamond Branch. Trial Transcript, 5-33. This was not a concession that Mr. Piers was guilty of all the charges before the jury.

The defense faults Butler for not arguing in summation that no fingerprints were found on the Norinco. Mr. Levine asked Butler at the evidentiary hearing if he thought that he should have made such an argument in closing. Tr. Evidentiary Hearing, p.133. Mr. Butler pointed out that there were no identifiable fingerprints found on the weapon although it was clearly fired by someone. Butler responded that it would have been different if someone else's fingerprints had been found on the weapon. Butler added that you can not go over every piece evidence in closing because of the limited time for summation and because you want to keep the jury focused on your major points. Thus, Mr. Butler saw no need to point out to the jury that Mr. Piers was a secretor because his prints were found on other items in the truck but were not found on the weapon. Tr. Evidentiary Hearing, p. 135.

Mr. Shem testified for the government that he was able to recover the serial number from the Norinco and it matched parts taken from Mr. Piers's residence. Mr. Shem also testified that the parts that were recovered from Piers's residence had indicia of having been used or attempted to be used in making a Norinco a fully automatic weapon. Tr. Evidentiary Hearing, p.127.

Discussion

I. Adequacy of Counsel's Representation at Sentencing

Whether Piers's Attorney Donald Marks Rendered Ineffective Assistance of Counsel at Sentencing by Failing to Raise an *Apprendi* Error

Piers contends that Donald Marks was constitutionally ineffective at sentencing for not raising an *Apprendi* error with respect to the sentence imposed for Counts 1 and 2. Piers also argues that his appellate counsel were ineffective by failing to raise *Apprendi* issues in his appeal of his sentence. Count 1 charged conspiracy to commit armed credit union robbery and Count 2 charged armed credit union robbery. Piers's sentencing took place on August 9, 2001.

The court grouped Count 1 with Count 2 for sentencing purposes. The base offense level was 20. The court imposed a nine level enhancement including two levels because the principal victim was a financial institution, two levels due to the physical restraint of the victim tellers, three levels because the loss to the credit union was over $250,000, and two levels because Piers was found to be an organizer. The first enhancement relating to the principal victim being a financial institution was an element found by the jury beyond a reasonable doubt. The remaining seven levels were argued before and found by the

court during the sentencing phase. *See* Transcript of Imposition of Sentence, p.11, 18.

On June 26, 2000 the Supreme Court decided *Apprendi v. New Jersey,* 530 U.S. 466 (2000), establishing the rule that any fact increasing the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. Piers argues that the seven level enhancement imposed on him for Counts 1 and 2 should have been submitted to a jury and proved beyond a reasonable doubt. He cites *Blakely v. Washington,* 124 S. Ct. 2531 (2004) holding that the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional fact findings. He cites *United States v. Ameline,* 376 F.3d 967, 974 (9th Cir. 2003) holding that the *Blakely* rule applies to the United States Sentencing Guidelines.

Attorney Marks argued that the proper standard for sentencing enhancements was a preponderance of the evidence, Indeed, that was the standard at the time of sentencing. At the time of Piers' sentencing, *Blakely* had not been decided, and so it could not possibly have been employed by defense counsel as a basis for appeal. Under *Apprendi* the court's sentence in this case did not exceed the prescribed statutory maximum sentence, so there was no basis for reliance upon *Apprendi.* Likewise, the argument that the district court violated Piers's Fifth and Sixth Amendment rights to a jury trial and to due process

of law by finding enhancing factors at sentencing by a preponderance of the evidence fails. Even at this date the Supreme Court has not rendered *Booker* retroactively to cases on collateral review. Circuit courts including the Ninth Circuit which have addressed the question have held that *Booker* does not apply retroactively. *See* for example, *United States v. Cruz,* 423 F.3d 1119 (9th Cir. 2005). Piers has not shown that Marks was incompetent for failing to advocate for a different standard of proof with respect to sentencing enhancement factors. An attorney is not required to be clairvoyant in order to render constitutionally adequate representation.

The trial court found several enhancements for the sentence imposed based on a preponderance of the evidence rather than relying only on the underlying facts for an enhancement that were found by the jury beyond a reasonable doubt. Piers argues that the enhancements imposed on Piers for Counts 1 and 2 should have been submitted to a jury and proven beyond a reasonable doubt and that Mr. Marks failed to make that argument during sentencing although *Apprendi v. New Jersey,* 530 U.S. 466 (2000) had been decided on June 26, 2000, more than a year earlier than the August 9, 2001 sentencing hearing. Piers argues that had Marks made an *Apprendi* argument it would likely have been meritorious as demonstrated by the outcome of *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531 (2004) holding that "the relevant 'statutory scheme' is not the maximum sentence a judge may impose after

finding additional facts, but the maximum he may impose without any additional findings."

The standard at the time of Piers's sentencing was the preponderance of the evidence standard argued by Mr. Marks. *United States v. Ameline,* 376 F.3d 967, 974 (9th Cir. 2003), holding that the *Blakely* rule applies to United States Sentencing Guidelines was decided after Piers's sentencing. At the time of the imposition of sentence on Piers, *Apprendi* did not apply to the United States Sentencing Commission Guidelines. Under contemporary Supreme Court decisions case law inferred that the guidelines in the manner in which they were applied in Piers's case were constitutional. *See Mistretta v. United States,* 488 U.S. 361 (1989) and *Edwards v. United States,* 523 U.S. 511 (1998).

The Ninth Circuit had not held that *Apprendi* precluded the court from applying the Guidelines in the manner used in Pier's sentencing. Thus, the failure to make an *Apprendi* objection to the use of the Guidelines was consistent with the practice of the overwhelming majority of counsel practicing in federal courts. Mr. Marks did not render constitutionally ineffective counsel by failing to be clairvoyant or by failing to assert new arguments not previously before the appellate courts. Piers's claim fails to meet the *Strickland* criteria.

At the time of Piers's sentencing, *Apprendi* by its terms did not apply to the United States Sentencing Commission Guidelines. Contemporary law such as

Mistretta v. United States, 488 U.S. 361 (1989) suggested that the guidelines in the manner in which they were to be applied in Piers's case were constitutional. Piers has not established that Marks' decision not to make an *Apprendi* argument fell outside of the standard for competent representation at the time of his sentencing hearing. For similar reasons appellate counsel were not constitutionally ineffective by not raising an *Apprendi* issue on appeal.

Whether Marks Rendered Ineffective Assistance of Counsel by Failing to Argue for Downward Departures

Piers also argues the Mr. Marks rendered ineffective assistance under *Strickland* by failing to argue for available downward departures. The argument in this regard is that Marks should have argued for a downward departure based on a showing of compassion and concern by Piers for the life of another based on teller Chastity Monette's testimony that Piers wrapped the tape around the teller's mouth rather than her nose when she complained that she had difficulty breathing. It is mere speculation as to why Piers decided to tape the teller's mouth rather than her nose. It may have been an act of compassion and it may not have been. Should the attorney have argued for a downward departure because Mr. Piers did not shoot the teller? Should any act of compassion have been deemed to have offset the anxiety and fear instilled in the teller

by taping her mouth in the first place? Failure to argue for such a downward departure did not constitute ineffective counsel under *Strickland*. Pp. 40-42.

Piers does not point to any particular guideline that might be applicable to a situation where a defendant refrains from causing greater injury to a victim than he actually did. The defendant cites no authority supporting his argument that his attorney rendered ineffective assistance under *Strickland v. Washington* for not arguing for such a downward departure. This argument by the defendant is clearly meritless.

II. Adequacy of Appellate Counsel's Representation

Whether Appellate Counsel Rendered Ineffective Assistance of Counsel Based on Failure to Argue That Butler Had an Irreconcilable Conflict with Piers and Should Have Been Relieved from Representing Him

Appellate counsel Fay Arfa and Donald Marks raised the issue of conflict between Piers and his trial counsel Mr. Butler stating that "[t]he record clearly demonstrates that a serious conflict existed between Piers and his attorney which prevented the attorney from providing adequate representation." Defendant Appellate Brief, p.15. Piers argues that those attorneys understated the extent of the conflict.

The record available to appellate counsel who did not try the case did not show the type of attorney-client relationship Piers now characterizes as going to the core of his attorney-client relationship where Butler allegedly acted as Piers' adversary, not his advocate. The Ninth Circuit Court of Appeals had adequate reference to the record before the district court to review the trial court's denial of the substitution of counsel motion. The defendant's argument fails to meet the *Strickland* criteria for ineffective counsel.

The Ninth Circuit Court of Appeals will entertain an ineffective assistance of counsel claim when the record on appeal is sufficiently developed to permit review and determination of the issue. *United States v. Robinson,* 967 F.2d 287, 290 (9th Cir. 1992). The facts supporting Piers's objection to the district court's denial of the substitution of counsel motion were sufficiently developed to support an argument on appeal.

A claim of conflict of interest on the part of trial counsel presents a mixed question of law and fact that the court of appeals reviews de novo. *United States v. Moore*, 159 F.3d 1154, 1157 (9th Cir. 1998). Under Moore, in order to establish a Sixth Amendment violation based on counsel's alleged conflict of interest, Piers must show that an actual conflict of interest adversely affected his lawyer's performance. He must prove actual conflict not just a possibility of conflict, through a factual showing in the record. *Id.* If the defendant has shown only a

possibility of conflict he must meet the performance and prejudice standard of *Strickland. See United States v. Miskinis*, 966 F.2d 1263, 1668 (9th Cir. 1992). In *Moore, supra* the court held that the defendant's threat to sue his defense counsel over counsel's handling of the government's offer of a plea bargain did not create an actual conflict of interest that would presumptively render counsel ineffective.

Piers did not convince the district court that the relationship between him and Mr. Butler had completely collapsed; thus, the motion for substitution of counsel was denied. Piers did not have substitute counsel readily available for the trial date set. There is no evidence of any bad language or threats being exchanged between Butler and his client. Mr. Butler did not claim that as trial counsel he would not advocate zealously or effectively for his client. Piers still has not made an adequate showing in that regard. As Mr. Butler explained at the evidentiary hearing, federal criminal defendants often express unhappiness with the situation they find themselves in prior to the date of trial. The district court did not err in accepting Butler's characterization of his relationship with Piers. The district judge considered the extent of the conflict as well as the timeliness of the motion. Because the request was based upon a general dissatisfaction with the retained attorney the district court made an adequate inquiry, and appellate counsel did not render ineffective assistance of counsel in their arguments on this issue.

Whether Appellate Counsel Rendered Ineffective Assistance of Counsel by Falling to Raise on Appeal Butler's Concession of Guilt on the Conspiracy Counts

Butler did not concede guilt as to both conspiracy counts. He explained at the evidentiary hearing that his strategy was to concede the criminal charge where the government's evidence was very strong in the hope that the jury would find credible his argument that the government had not produced sufficient evidence to convict Piers of the gun related charge which carried a greater penalty. Piers relies upon *United States v. Swanson,* 943 F.2d 1070 (9th Cir. 1991) wherein the court held that the court-appointed defense counsel's concession during closing argument that no reasonable doubt existed regarding the only factual issues in dispute constituted a deprivation of the defendant's right to due process and effective assistance of counsel. The *Swanson* court found that the concession in that case denied the defendant fundamental fairness. But the court recognized that in some cases a trial attorney may find it advantageous to his client's interests to concede certain elements of an offense or his guilt of one of several charges. 943 F.2d at 1076.

I conclude from the evidentiary hearing that Butler consulted with Piers before making the concession and Piers at least had an opportunity to object if he did not agree to take the risk as to that trial strategy. Butler's concession was not a clear violation of law as suggested by Piers. Where the

evidence identifying the defendant as the perpetrator is overwhelming it is not necessarily ineffective assistance of counsel for the attorney to present a defense to persuade the jury to find the defendant not guilty of a greater offense. *See United States v. Bradford*, 528 F.2d 899 (9th Cir. 1975). Even if counsel had conceded the defendant's guilt without consulting him or obtaining his consent as part of a trial strategy to make a challenge to the other charges more credible, Piers still must prove prejudice under *Strickland v. Washington, supra* and *United States v. Thomas, supra*. Because it was part of Butler's trial strategy it did not constitute an abandonment of the client. The prejudice prong of *Strickland* test is not satisfied here.

Piers argues that Mrs. Arfa and Mr. Marks rendered ineffective assistance of counsel by raising the ineffective assistance of trial counsel claim on direct appeal rather than by collateral attack. This claim fails because Piers cannot show prejudice. He has not been precluded from raising that issue in this collateral proceeding. Because Butler's closing argument did not fall outside the boundaries of competent advocacy and did not constitute ineffective assistance of counsel, appellate counsel was not required to raise that issue on appeal because it had little likelihood of success. *Morrison v. Estelle*, 981 F.2d 425, 427-28 (9th Cir. 1992).

Piers faults the district court for not sua sponte appointing substitute counsel in place of Mr. Butler to argue the motion by counsel to withdraw. The

premise of this argument is that in order to have merit, it must have become clear to the court that the conflict between Piers and Butler was irreconcilable. The district court disagreed and denied the motion to withdraw, In an attempt to reargue the matter Piers made several statements at the hearing before the district court denying that Butler had responded to his questions and claiming that he had not done anything in the case. Mr. Butler told the court that this was simply not true and that such a statement was a lie. Piers claims that this colloquy demonstrates that there was an irreconcilable conflict with his counsel. However, the strong response by Butler was precipitated by the strong accusations made by Piers against his attorney. Mr. Butler was not required to remain mute so that Piers could have a stronger (but false) basis for claiming that his attorney was denying him a fair trial. The record shows that appellate counsel's performance did not fall below the standard of competency of counsel.

III. Constitutional Violations by Government

Alleged *Brady* Violation by the Government

The defendant claims that the government withheld from the defense an important part of the plea agreement with Ray Hubbard, namely that Hubbard was promised that the government would not pursue an investigation against his sister, Megan, whose fingerprints were found on the map of the credit union located in Hubbard's backpack. Piers has

not offered proof of his assumption that Hubbard's plea agreement was induced by the government's promise of inaction against his sister. The testimony of Special Agent Lou Ann Henderson at the evidentiary hearing negates Piers's assumption.

There is no evidence that Hubbard's incentive to testify on behalf of the United States was motivated by the government's promise not to investigate or prosecute Hubbard's sister. Hubbard's incentive to testify favorably on behalf of the government was likely in the hope that the government would file a substantial assistance reduction motion in his behalf. The jury was made aware of this incentive.

Piers also accuses the government of withholding exculpatory information regarding the reference to "Adam" during their investigation. Piers has not identified any exculpatory evidence regarding Adam allegedly held by the government during discovery or prior to trial. Even at this date, years after the trial, the identity of Adam is unknown and his role in the criminal conspiracy, if any, remains speculative. Piers has failed to show that the government violated his due process rights or violated *Brady v. Maryland, supra* by withholding from the defense information about Adam.

The fact that the prosecutor questioned Hubbard about "Adam's involvement" in the alleged conspiracy adds nothing to the instant claim. Piers has continued to dispute that he was the individual who

shot at the policeman and to deny his guilt as to the (conspiracy to use the gun in the robbery). But he was not denied any knowledge or information about Hubbard's reference to an "Adam" prior to trial. Piers had a fair opportunity to present evidence to the jury that "Adam's" involvement in the alleged conspiracy should not be attributed to him. Piers offers no evidence that he timely presented additional facts to Butler about Adam that might support his claim that the government knew something about Adam that it did not disclose to the defense. Evidence is material under *Brady,* "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). In the present case, the evidence against Piers was overwhelming, and there has been no showing of a reasonable probability that material evidence was withheld sufficient to undermine confidence in the outcome.

IV. Ineffective Assistance of Counsel Claims Against Trial Counsel

1. Motion to Withdraw

Butler's motion to withdraw as counsel must be considered in the context of the court proceedings in this case. It appeared that there were about 2,500 pages of discovery, plus physical evidence and a State

search warrant which had not yet been unsealed by the State court, as well as pending laboratory results by the government before the case could be readied for trial.

On August 3, 2000, Judge Holland, the trial judge, stated that the case was out-of-the-ordinary and allowed attorney Bill Bryson to substitute for Geddes to represent co-defendant Franklin. Franklin moved to sever his trial from the other defendants based upon an interlocking confessions.

Mr. Butler's motion to continue motion practice and the trial date was joined by co-defendants Franklin and Hubbard. The court granted an extra 30 days on the grounds of continuity of counsel. A motion to sever Franklin was granted and defendants Piers and Hubbard were set to be tried first on November 13, 2000.

Piers moved for severance from Hubbard on September 14, 2000 (Doc. 32). That motion was denied on October 31, 2000, Doc. 53. On October 18, 2000, a superseding indictment was filed. The next day co-defendant Hubbard entered into a plea agreement with the government. Piers was arraigned on the superseding indictment and pretrial motions for the Superseding Indictment were set for October 26, 2000.

On October 25, 2000, Piers moved unopposed to continue the trial set for November 13, 2000 (doc. 48). The court set a hearing on that motion for November 7, 2000. On that date, the court granted the

continuance of trial to February 5, 2001, for defendant Piers with the trial-by-jury for defendant Franklin to trail. (Doc. 54.)

On January 26, 2001, Piers moved to continue the jury selection. Doc. 64. A hearing was set for January 31, 2001. On January 30, 2001, Butler moved to withdraw as counsel. Doc. 73. On January 31, 2001, the court denied the motion to continue jury selection and the motion to withdraw. *See*, Doc.76. Trial by jury commenced February 6, 2001. Piers through his counsel Rex Butler moved for CJA appointment of counsel. Doc. 78. That motion was granted February 7, 2001. Doc. 79. The court appointed Rex Butler.

Piers argued on appeal that the district court should have allowed Butler as retained attorney to withdraw so he could obtain new counsel. The Ninth Circuit considered the following facts: "On January 26, 2001, Piers' mother wrote his trial counsel, Rex Butler, and requested that he withdraw from Piers' case. On January 30, 2001, six days before Piers' trial was scheduled to begin, Butler filed a motion to withdraw, stating that (1) the Piers family "is unhappy with my services"; (2) Piers "is unable and or unwilling to pay for the trial"; and (3) his motion is based on "the breakdown in attorney client communications." The appellate court also had before it Piers' explanation to the district court at the January 31, 2001, hearing wherein Piers explained to Judge Holland why he wanted Butler to withdraw. Piers stated: "I feel that there's been a gross negligence and

a malfeasance on the part of the [FBI and Anchorage Police Department] due to the lack of investigation regarding the information that they've been given and . . . they've focused on me from the beginning . . . [A]nd the paperwork that I've generated while I've been held hasn't been acted upon by my counsel because I assumed there was a lack of funds, but there's a lot of investigations that I wanted completed, and there's a lot of people that I expected to be interviewed and a lot of other work done. So I don't know what to do. . . ." Butler responded to the trial judge that he believed Piers misunderstood the process to some degree and that Piers would not see him some of the times he went down to the jail because Piers' mother had told him not to talk with Butler unless she was in town. Piers denied that that was true and stated that he believed Butler did not have his best interest at heart.

Piers argued in his appeal that the district court failed to conduct an adequate inquiry to determine the nature and extent of the breakdown in the attorney-client relationship. In reviewing the denial of the substitution of counsel, the court of appeals considered not only the timeliness of the motion, but the adequacy of the trial court's inquiry and the extent of the conflict created. *See*, slip op. at 3838 9th Cir. (2003) filed as an attachment to the judgment at doc. 189.

The court of appeals found from the record that Piers had brought to his attorney's attention that he was dissatisfied with his representation ten days

prior to trial, although Butler's motion to withdraw was not submitted to the trial court for another four days. In holding that the motion to withdraw was untimely, the court considered the fact that any new counsel would likely have needed a substantial continuance to comply with Piers' expressed desires. The trial had already been postponed once upon a motion by Piers. With regard to the adequacy of the trial court's inquiry, the appeals court noted that the district court had allowed Piers to speak at great length about his reasons for desiring new counsel and that Piers and Butler were allowed sufficient time to detail the reasons for the request to withdraw as counsel. Furthermore, the court of appeals held that Piers had not demonstrated that an extensive conflict existed with Butler. Piers' dispute centered around the defense and litigation tactics. The appeals court noted that litigation tactics are decisions generally left to defense counsel, citing *United States v. Smith*, 282 F.3d 758, 763 (9th Cir. 2002). The Ninth Circuit also held that Piers had not demonstrated a conflict serious enough to warrant concluding that his Sixth Amendment right to counsel was denied.

At the evidentiary hearing on the § 2255 motion, Mary Hutchison, mother of William Piers, testified that she retained Butler to represent her son. Sometime in November 2000 she demanded that Butler get off the case. She later followed that request in writing. Tr. Evid. Hrg, p.238.

Although Butler was retained to represent Mr. Piers around August 2000, Butler acknowledged that

there had been several discussions about him getting off the case before he formally filed a motion. In his opinion the discussions had not progressed to the point where he felt that he could not work with the defendant in an attorney-client relationship prior to actually filing the motion to withdraw. Mr. Butler testified that he could not recall the specifics of Piers disliking his legal services. When shown the transcript of the colloquy before the trial court on the motion to withdraw, Mr. Butler had no specific recollection of the events or the testimony but agreed that the transcript appeared accurate. At the evidentiary hearing Butler explained why he did not move to withdraw at the initial first request of Mr. Piers' family.

There is no proof that Butler was fired by Piers as of a certain date. Under the circumstances it appears that Butler made an adequate effort to inform the court timely about the breakdown of attorney-client relationship after he had made a reasonable effort to try to work with Piers in preparation for trial.

The trial transcript reflects that after the motion to withdraw was denied, Piers was not left to go to trial with an attorney who was not effectively communicating with him or rendering effective assistance of counsel. A criminal defense lawyer is not required to accept at face value what his client tells him. During the trial, it appears that Butler and Piers had an adequate attorney-client relationship which did not prevent Butler from communicating

with Piers or raising objections and submitting motions on his behalf. In his motion to vacate Piers claims that prejudice must be presumed. He points to no specific prejudice as to Butler's actual representation attributed to the late filing of the motion to withdraw. Under the circumstances of this case I cannot find any presumption of prejudice enures to the defendant's benefit.

The record in the instant case fairly construed indicates that Piers was able to communicate with his counsel during key trial preparation times. Piers was able to communicate his defense theories to Mr. Butler although he did not agree with all of the trial strategy implemented by Butler, Mr. Piers was able to provide information he had to his attorney and to participate in the making of decisions in his prosecution. Piers has pointed to no critical stage of the proceedings in which he was prevented from assisting his attorney or receiving communications from his attorney. In the instant case, Judge Holland assessed the facts and determined that there was no complete breakdown in the attorney-client relationship. In the instant case, there is no reason to believe that different counsel would have been able to locate the missing "Adam" or produce additional material evidence based on what Piers communicated to his attorney. Since Piers asked for court-appointed counsel at the eve of trial, short of a serious breakdown in communications which was not shown to the trial judge, the trial court properly exercised its discretion to appoint the same attorney, Mr. Butler,

who had substantial time invested in preparing the case for trial.

Piers cites *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005), in support of his argument for or presumption of prejudice. The case in inapplicable. Daniels was a 66-year old paraplegic on California's death row, having been convicted of two counts of first-degree murder for the shooting death of police officers. As a basis for his motion to substitute counsel before the State trial court, Daniels explained to the trial court that he had a conflict of interest with the public defender's office which had represented him in plea negotiations concerning a prior robbery arrest. The conflict arose when, unknown to Daniels, his public defender in the robbery case simultaneously engaged in negotiations with the district attorney's office for Daniels' plea while the attorney was negotiating for a position with the district attorney's office. Neither the prosecutor nor the public defender who replaced Daniels' first attorney apprised the court of the plea agreement's condition permitting Daniels to seek treatment in lieu of immediate incarceration. Daniels sought an attorney who was not a part of the public defender's office because he mistrusted that office. The court denied his motion for substitution of counsel. After exhausting his State remedies, Daniels sought *habeas* relief in federal district court. That court denied relief following an evidentiary hearing. In its opinion, the Ninth Circuit stated that a defendant has a Sixth Amendment right to conflict-free representation, but

not every conflict between a defendant and counsel implicates the Sixth Amendment. 428 F.3d at 1196. Quoting from *Morris v. Slappy,* 461 U.S. 1, 3-4 (1983) the Ninth Circuit referred to the Supreme Court's explanation that the right to counsel does not guarantee "a right to counsel with whom the accused had a 'meaningful attorney-client relationship.'" The Ninth Circuit proceeded to assess the nature and extent of the conflict and whether that conflict deprived the defendant of representation guaranteed by the Sixth Amendment. First, the court noted that the conflict was not one created by Daniels or by his counsel.

In *Daniels,* the federal district court held that Daniels and his counsel were involved in a clear showing that the breakdown amounted to a constructive denial of his right to counsel. On the basis of the record in *Daniels,* the Ninth Circuit held that the "serious conflict" gave rise to a presumption of prejudice. The court found that the breakdown in communications so impeded counsel's ability to provide assistance as to the basic considerations for defense.[3] Unlike the instant case, in *Daniels* the State trial court had never questioned Daniels or his attorney individually after Daniels informed the court

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[3] To determine whether Butler's alleged errors prejudiced Piers in the outcome of the trial this court must compare the evidence that actually was presented to the jury with that which could have been presented had counsel acted "appropriately." *See, Bonin v. Calderon,* 59 F.3d 815, 834 (9th Cir. 1995).

of the conflict. Another distinction in *Daniels* is that Daniels informed the trial court three months before the trial that he did not trust his appointed counsel and that his trial counsel could not properly represent him. 428 F.3d at 1200. As a result of the conflict, Daniels' counsel was unable to discover the basic information necessary to defend Daniels. Daniels' defense counsel also failed to follow-up on information that suggested that Daniels suffered from a mental disorder.

An attorney's obligation is to his client. Piers' argument that Butler did not timely move to withdraw confuses the dissatisfaction of his mother who had paid the retainer to Butler with the lack of a clear demand from Piers, himself, that Butler get off the case. Piers now argues that because he was not speaking to Butler at the time, and Butler was certainly on notice that his attorney-client relationship with Piers was "in trouble," that Butler should have earlier filed his motion to withdraw as counsel. The Model Code of Professional Responsibility relied upon by Piers requires a mandatory withdrawal once the client decides to terminate the relationship with his attorney. Granted that a client has a right to discharge his lawyer at any time with or without cause, the facts of this case do not substantiate Piers' claim that Butler waited more than a few days after Piers' request to terminate was submitted to Butler. The record does not support Piers' claim that both he and his mother fired Butler "multiple times" before Butler brought

the matter to the court's attention. In light of the Ninth Circuit's ruling, the remaining issue is whether Butler rendered ineffective assistance of counsel in his actual representation of Piers before the trial court. To the extent that Piers argues that *he* was not effectively communicating with his attorney, for example with the failure to locate a potential witness named "Adam," Piers still has not provided enough information about Adam that would render Mr. Butler's handling of that matter constitutionally inept.

Judge Holland had before him to consider on Butler's motion to withdraw Piers' letter written the day before trial wherein Piers stated that he did recognize his "forced" counsel. The trial judge considered and rejected Piers' claim that Butler was acting outside his best interests, was not providing legal counsel or answering his questions. Piers has not produced evidence in his motion to vacate that would render the trial judge's rejection of the motion to vacate an abuse of discretion or error of law. As the court of appeals recognized, Piers could have communicated to the court sooner or demanded that Butler get off his case months prior to trial.

Prior to trial Piers presented no evidence that an extensive conflict existed between him and his attorney, Butler. His mother who paid the retainer had no first-hand knowledge of the relationship between Piers and Butler. The record reflects that at trial Butler was prepared and did represent Piers in compliance with the defendant's Sixth Amendment

right to counsel. In his direct appeal of this case the Ninth Circuit concluded that there was no evidence of an extensive conflict between Piers and Butler to have warranted the granting of the motion to withdraw by the district court.

Piers argues that it was ineffective counsel for Butler to argue his own motion to withdraw. The motion to withdraw was not based upon a conflict and there was no need to have a different attorney attempt to describe relationship between Mr. Butler and Mr. Piers. There is no allegation that Mr. Piers was not able to speak up for himself before the court in characterizing his attorney-client relationship with Butler. The relationship was not antagonistic or quarrelsome as occurred in *United States v. Adelzo-Gonzalez*, 268 F.3d 772 (9th Cir. 2001), cited by Piers. Mr. Butler did not abandon his adversarial role in representing Piers at the hearing on the motion to withdraw. When it appeared that the district judge was not inclined to grant the motion, Mr. Butler indicated that he would be prepared to proceed with trial. Piers would place all of the "blame" on his attorney for not bringing the soured relationship to the court sooner. To the contrary, Butler tried to work with his client in his difficult circumstance of facing a long prison sentence. Butler's representation did not fall below an objective standard of reasonableness by not bringing the matter to the court sooner based merely on the dissatisfaction of Piers family with the defense attorney.

2. Failure to Investigate

Piers asserts that a person called "Adam" may well have been the person who entered the credit union and fired the Norinco rifle at the police. He contends that Butler rendered ineffective assistance of counsel by not sufficiently investigating such a defense. Piers has not provided information about the full identity of "Adam" although, according to Hubbard, Adam was present when he and Piers discussed the plan to rob the credit union. The government never located Adam nor did Hubbard provide sufficient information to identify an actual person referred to as "Adam." Piers appears to be arguing that Butler should have made a more convincing argument to the jury that Adam may have been the person who committed the crimes particularly with respect to the Norinco. Piers has not identified what beneficial evidence might have turned up with additional investigation into the identity of Adam. Thus, Piers has not met the prejudice prong of the *Strickland* test.

The motion to vacate states that Piers repeatedly asked Mr. Butler to investigate the existence and whereabouts of an uncharged member of the conspiracy, known only as "Adam." Motion to Vacate, Docket No. 203, p.7. Mr. Piers did not testify at the evidentiary hearing. From the evidence I am satisfied that Piers asked his attorney to try and identify and locate Adam. However, I cannot agree that Butler inadequately failed to investigate the claim that an uncharged member of the alleged conspiracy

committed the robbery or fired the machine gun. Piers faults his attorney for not hiring an investigator to attempt to track down the person vaguely described as "Adam." It is not accurate to say that no investigation was done. Mr. Butler made inquiry of the government to determine if they had any information that might identify "Adam." He talked to co-counsel and to his client Mr. Piers. Piers criticizes Mr. Butler for not attempting to interview the co-defendants, themselves. This criticism overlooks the canons of ethics that would prevent an attorney from contacting another criminal defendant who has separate counsel. Mr. Butler did obtain through cross-examination of FBI Agent Lou Ann Henderson at trial some information about a person who could have been the "Adam" referred to by Piers. It was reasonable for Mr. Butler to assume if this "Adam" was implicated in the crime the government was also looking for him prior to the trial.

Agent Henderson testified at the evidentiary hearing on August 16, 2005 that the FBI did in fact look for anyone involved in the bank robbery. The government did look for and locate a third individual who ended up being Donald Douglas Franklin, Jr. This is not a case where a defense attorney undertook no effort to investigate the facts as related by his client. The defense attorney has a duty to undertake reasonable investigations unless a reasonable decision dictates that the particular investigation is unnecessary or has reached a dead end.

The failure to locate "Adam" was not based upon a strategic rationale but rather a practical reality of the facts not producing sufficient leads to require further investigation. It is not a question of whether Mr. Butler could have done more, for example by hiring an investigator to look for "Adam," but whether his investigative efforts were reasonable under the circumstances. Piers has not demonstrated prejudice by Mr. Butler's failure to conduct further investigation for "Adam." Piers has not shown what the investigation might have produced or provided exculpatory evidence for the defendant. The facts of this case do not merit a finding of ineffective assistance of counsel based on Piers' argument that even if the investigation would have led to a blind alley, this might have been helpful in assisting Piers to confront the difficulties of his defense. Nor did the lack of further investigation prevent Mr. Butler and Mr. Piers from effectively communicating with each other.

Mr. Butler did not ignore the request to identify Adam, he simply had insufficient information to do so. Mr. Butler may have misstated the extent of information about Adam when he told the court during the ex parte hearing on Piers's motion to withdraw that the name Adam had "not surfaced" even though Raymond Hubbard was cooperating with the government. The *identity* of Adam had not surfaced. Although Hubbard talked about an Adam, he, too, provided insufficient specificity for the

defense or the government to be expected to locate Adam prior to trial.

Hubbard testified at trial that he had met Piers at "Adam's house," and that Adam was one of his friends. Just because Hubbard implicated a person he called "Adam" as a member of the conspiracy does not inevitably lead to the conclusion that Adam could have exonerated Piers or enabled him to develop a defense. Maybe he could and maybe he could not.

Even at this late date Piers has not furnished enough information about the existence of and participation by an individual identified as Adam to expect a reasonably prudent attorney to have undertaken further investigation to locate such potential witness, Butler testified that despite this inadequate description he went to an apartment complex and tried to find out about a person named "Adam." Piers's argument relies in part about the exchange occurring between Hubbard and Anchorage police Detective Vanderveur on the day of Hubbard's arrest and on Hubbard's testimony at trial, Assuming arguendo that Adam existed, his role in the bank robbery is purely speculative, particularly with regard to exculpating Piers. Moreover, there is no reason to conclude that any defense attorney would have been able to locate "Adam" based on the minimum description and information provided by Piers at the time.

Piers has not provided the full name for "Adam" nor a residential address to date. Piers never

explained how his attorney should have found "Adam" or what the role of "Adam" actually was in relation to the crimes charged. On the information provided to Butler, his efforts to locate "Adam" did not fall outside the scope of competent representation. To establish prejudice, Piers has to demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome, Piers has not shown how the absence of "Adam" reasonably affected the outcome of his trial, or how his alleged deficient performance raises sufficient doubt as to the defendant's innocence to undermine confidence in the verdict.

3. Failure to Move to Suppress

Piers contends that Butler rendered ineffective assistance of counsel by failing to move to suppress the use of Piers's post-arrest statement to Officer Bloodgood. The first statement Piers identifies is one made to Officer Bloodgood after other officers had arrested him.

After Piers was placed in the patrol car officer Matt Bloodgood asked him for his name. He laughed and said it was "William." Officer Bloodgood asked him if he knew where the other suspect was and Piers said you already have him – the one with the wet and muddy clothes. The officer asked Piers for that

"suspect's" name and he wouldn't give it. (The officer did not say "accomplice"). Piers then said "Everything is in my name, it's all mine." Tr. 4-22. The incriminating response by Piers was not responsive to the question asked by Officer Bloodgood. Assuming that this statement was elicited during custodial interrogation in violation of *Miranda,* Piers must now show that the admission of that evidence was prejudicial. Piers states that the only evidence that he fired the machine gun came through the testimony of co-conspirator Raymond Hubbard. Hubbard was apprehended and interrogated apart from any statements attributed to Piers. Given the other voluntary admissions by Piers and the overwhelming evidence against him at trial, including items independently connected to Piers; he cannot prevail on the prejudicial prong of ineffective assistance of counsel.

The second statement arose in an interview room at the police department on June 27, 2000. Detective Vanderveur informed Piers that he had already interviewed his "friend" (Raymond Hubbard) and that this could be Piers's only opportunity to present his side of things. The officer's statement was made before the interrogation began. Before Detective Vanderveur could proceed with his advisement of rights Piers indicated that he had some things he wanted to say and asked Detective Vanderveur to turn off the recording. The officer switched off the audio tape but left on the video tape recording. Piers stated, "I know I already turned myself into a

criminal and pretty much disgraced my family. And I haven't told them yet, but I'd like to do whatever it takes to work things out, but obviously I'm gone for a long time." *See Trial* Transcript 4-90; Exhibit C (Video – also marked as Exhibit 60 for trial) Detective Vanderveur then switched the audio tape recorder back on and read Piers his *Miranda* rights. Piers immediately requested to see his attorney and the officer terminated the interview.

Piers argues that this scenario constituted an impermissible custodial interrogation. It is not disputed that Piers was in custody for purposes of the *Miranda* warnings. Piers argues that his attorney should have moved to suppress those statements and should have objected to them when offered at trial. A reasonably prudent attorney might well have concluded, as did Mr. Butler, that Piers's statements to Detective Vanderveur were volunteered not obtained through interrogation. Explaining an interrogation technique to the suspect is not the same as interrogating him. Statements that are not in response to any question but are spontaneous statements are not excluded under *Miranda. See Oregon v. Elstad,* 470 U.S. 298, 312-14 (1985). An attorney does not render ineffective assistance of counsel by failing to make a motion that he reasonably believes to be meritless. *Lowry v. Lewis,* 21 P.3d 344, 346 (9th Cir.), *cert. denied* 115 S. Ct, 513 (1994).

Piers has failed to establish how the admission of his post-arrest statements were prejudicial in regard

to the outcome of the case. There was substantial direct and circumstantial evidence presented against Piers at trial aside from his statements. Thus, the admission of his statements did not reasonably change the outcome of the trial. In the statements at issue Piers did not admit that he committed the robbery or conspired to commit the robbery.

4. Testimony About Nearby School and Public Reaction

Piers argues that Butler rendered ineffective assistance of counsel by failing to object to "irrelevant and unfairly prejudicial evidence" as to the reaction of the public to the crime. The government elicited on direct examination of FBI case agent Lou Ann Henderson testimony about her arrival at the crime scene and the extent of the crime scene during the search for suspects. SA Henderson testified that motor vehicle traffic was stopped from entering the crime scene area, and the law officers received some public assistance. Trial Transcript 4-64. SA Henderson testified to the disruption caused to morning commuters, assistance to officers rendered by members of the public, and the police department's concern for the public safety, including a report of suspicious individuals at a nearby elementary school. Tr. 4-66.

Piers now argues that this line of testimony was unfairly prejudicial and inflammatory because it tended to incite jurors to find Piers guilty because he

"jeopardized public safety and children." Piers assumes without addressing the matter that objecting to this evidence would have been to his benefit. The disruption to the public and the precipitation of a concern for public safety by the police was caused by the commission of a crime. The school was near the area where Piers was apprehended. The issue at trial was whether Piers was one of the perpetrators of the crime(s).

The government was entitled to present the facts and circumstances caused by the criminal conduct and investigations undertaken to apprehend Piers and Hubbard at the crime scene. Agent Henderson's comments at trial were made in general, not directed to Mr. Piers. The comments by Agent Henderson were not offered to inflame the jury, nor in context do they seem to be unfairly prejudicial to Piers. Piers has not shown that the absence of an objection by Butler to these statements by Agent Henderson fell below the level of a reasonably competent attorney.

5. Failure to Seek a Change of Venue

Piers argues that Butler rendered ineffective assistance of counsel by failing to move for a change of venue. As grounds for such a motion Piers relies on the voir dire record that shows that some of the prospective juror pool as well as the jury that was eventually empaneled either personally knew the officers involved, were members of Credit Union 1 (the credit union robbed), or had watched or read

parts or all of the extensive media coverage surrounding the robbery, including the names of the suspects apprehended. The voir dire colloquy occurred during jury selection after a pretrial motion for change of venue would have been filed. The issue on a motion for change of venue is whether the defendant can receive a fair and impartial trial in the situs of the trial court where the trial is likely to take place. Questioning potential jurors and exercising peremptory challenges is an important means of assuring that a fair trial will take place.

Piers has not shown that the court would have granted a motion for change of venue nor has he shown any reasonable probability that the outcome of his trial would have been any different. A change of venue must be granted when there exists in the community "so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial. . . . Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." *United States v. Collins,* 109 F.3d 1413, 1416 (9th Cir. 1997). The record contains no evidence that Piers did not receive a fair and impartial trial before a fair cross section of the public. There is no evidence in the record that the venire was predisposed to convict him based on anything they knew about the case prior to arriving at the courthouse. In short, there is no basis for a pretrial motion for change of venue. The concerns that particular members of the venire who

might be members of Credit Union 1, know someone involved in the case, or be influenced by extensive media coverage are all matters that could have been and were addressed during the selection of the jury. The record reflects that the jury venire had little or no prior knowledge of the case. There is no basis for concluding that Butler rendered ineffective assistance of counsel under *Strickland v. Washington,* by failing to move for a change of venue.

6. Failure to Make an Opening Statement

Piers argues that Butler rendered ineffective assistance of counsel by failing to make an opening statement. He argues that this failure was exacerbated by Butler's reserving the right to make an opening statement and then not doing so.

After the government's opening statement, Butler requested that the trial judge inform the jury that the defense was reserving its right to make an opening statement at a later time, Record Transcript, 1-152. Piers now complains that the jury had no defense theory to consider as a backdrop in evaluating the government's case-in-chief. The timing of an opening statement, including whether to make one at all, is a reasonable strategic decision that falls within the discretion of trial counsel and generally does not constitute a basis for a claim of ineffective assistance of counsel. *United States v. Rodriguez-Ramirez,* 777 F.2d 454, 458 (9th Cir. 1985); *LaGrand v. Stewart*, 133 F.3d 1253, (9th Cir. 1998). Piers has

not suggested any plausible theory of what he believes his counsel should have submitted as a theory of defense. He argues that Butler missed an opportunity to remind the jury about the government's burden of proof. The jury was adequately advised on the burden of proof.

Piers argues that Butler assured the jury that he would be giving an opening statement. At the beginning of the trial and out of the presence of the jury, the court allocated thirty minutes for Butler to make an opening statement. Trial Transcript 1-122, After Mr. Collins made an opening statement for the government, Mr. Butler advised the court out of the jury's presence that *Piers* wanted a statement read as an opening. Tr. 1-148. Butler told Judge Holland he did not think it was appropriate, that the statement contained information which should not be given to the jury and the court agreed. Tr. 1-150. Butler told the judge he would reserve any opening. Tr. 1-151. The jury then returned to the court room. At the close of the government's case-in-chief, the court asked Butler if the defense would be calling any witnesses. The defense rested. Tr. 4-114. There was no "assurance" made to the jury that the defense would make an opening statement.

The defendant has not pointed to anything said in the government's opening statement before evidence was adduced that would have required a reasonably competent attorney to necessarily make an opening statement after the government made theirs, Mr. Butler chose not to make an opening

statement at that time because he did not want to provide the government with a blue print to his defense. The defendant might have been in a worse position had Mr. Butler described Piers's defense and then changed the defense actually offered. What an attorney says in an opening or closing statement is not evidence, Mr. Butler had ample opportunity to argue the defendant's case in his closing summation. Notably the defendant has provided no case authority holding that an attorney renders ineffective assistance by choosing not to make an opening statement.

7. Failure to abject to Certain Evidence

Butler is alleged to have rendered ineffective assistance by failing to object to the introduction of false CIA identification badges and documents in the names of Piers and Douglas Franklin that were found in Piers's bedroom and on his computer. At trial. Butler indicated that the badges were irrelevant though he did not object to their admission, Transcript 4-7. The relevant inquiry is whether that evidence was unfairly prejudicial to Piers. Piers argued that it created an impression that he had a fixation on secretive, para military-type activities. It is not at all clear that the evidence would not have been admitted had Butler objected to it. Butler chose to downplay the existence of the evidence rather than make an issue over it. No showing a prejudice has been made based on the admissibility of those documents.

8. Testimony of Steven Payne

Butler is alleged to have rendered ineffective assistance of counsel by failing to object to the testimony of Steven Payne, FBI Computer Forensic Expert, that 28 compact disks of data had been taken from Piers's computer. Piers refers to the court's ruling out of the presence of the jury that the only evidence from his computer that would be admitted was the resumes of Piers and Franklin, the forms and photographs used to create the CIA identification badges, and a portion of a document containing information on obliterating the serial number from a firearm. Transcript 4-3 to 8. On direct examination of the computer forensic expert the prosecutor asked Special Agent Payne to identify Exhibit 55A. Trial Transcript 4-32 Agent Payne indicated that it was one of the CDs that he had created based on the results of the examination of Piers's computer, The prosecutor asked Agent Payne if that was a portion of the results of the examination of Piers's hard drive that was found in his computer. Agent Payne indicated that it was but then added: "This is one of several CDs. There were – there was so much data involved that it required the creation of approximately 28 CDs to hold all of the information that was seized from the computer evidence." Trial Transcript 4-32. The prosecutor clarified by asking if that CD was one of 28.

The court order addressed the content of information on the CDs not the number of CDs. Piers reads too much into the response of Agent Payne that

the CD being introduced was one of 28 CDs. Piers claims that it raised a negative inference that an enormous amount of incriminating evidence existed that the jury was not seeing. It is just as reasonable to conclude that only one of 28 CDs had any bearing on the case. The negative inference suggested by Piers is mere speculation. No prejudice has been shown as a result of the trial attorney allowing that line of questioning to stand.

9. Use of Mannequin

At trial the government used a mannequin to display items of evidence. The government introduced several articles of clothing allegedly worn by the robber. These items were not found together. Piers contends that Butler rendered ineffective assistance of counsel by failing to object to the government's use of the mannequin which displayed the items collectively to the jury as a "single unit." *See* Record Transcript 4-94. Mr. Butler made no objection to the use of the mannequin. Piers argues that the failure to object encouraged the jury to draw unfavorable inferences about the state of the evidence and its connection to Mr. Piers that would otherwise not be made.

The government never represented at trial that all the items were found together. The government did not argue in its summation that these items were found together or that the jury should draw an inference about the evidence by viewing all of the

items together. The evidence connected the apparel to the testimony of an officer as to how he perceived an individual dressed although he did not know the identity of the individual at the time. The evidence was relevant and not unfairly prejudicial. No constitutional right to the effective assistance of counsel was denied by the introduction of this evidence without objection.

10. Cross-Examination of Officer Reeder

Piers contends that Butler incompetently cross-examined Anchorage Police Officer Dan Reeder as to the machine gun evidence. Officer Reeder testified that he believed the person who fired the assault weapon at his patrol car had a goatee and was wearing a faded Carhartt jacket. Transcript 3-58, 60. Piers argues that this description fit that of Raymond Hubbard not him. Mr. Butler elicited testimony from Officer Reeder that he never actually saw the person who fired at his patrol car. Transcript 3-60. Co-defendant Hubbard identified Piers as the shooter. Piers uses hindsight to second guess the question asked of Officer Reeder. On its face it was reasonable to question whether the officer got a good look at the person he was describing as the possible shooter. Reeder testified after Hubbard. Piers uses hindsight to argue that his attorney should not have challenged the reliability of the officer's testimony to undermine the government's case. *United States v. Villalpando,* 259 F.3d 934 (8th Cir. 2001), cited by Piers, is readily distinguishable. In *Villalpando,* the defense attorney

elicited testimony of the defendant's violent nature. The appellate court held that in the drug-related prosecution no competent trial attorney would have elicited testimony from a government's witness on cross-examination that the defendant made threats to her and told her that the defendant had ordered a murder. 259 F.3d at 939. The challenged examination of Officer Reeder did not fall below the standard of a reasonable competent attorney. Thus, the first prong of *Strickland* is not met.

11. Cross-Examination of Robert Shem

Piers argues that Butler should have cross-examined forensic expert Robert Shem on whether the Norinco assault rifle was an automatic or a semi-automatic rifle. Mr. Shem examined the Norinco assault rifle used in the robbery. According to his testimony the rifle was originally semi-automatic which had been modified to allow the user to fire the weapon either as a semi-automatic or an automatic. Transcript 3-79.

Piers argues that his attorney should have asked questions during cross-examination of Mr. Shem regarding whether the rifle, as fired, was an automatic or a semi-automatic. Since Mr. Shem would have been uncertain about whether the rifle was fired as an automatic or semi-automatic, Piers argues, this would have cast uncertainty as to whether the shooter was aware that the rifle was capable of firing as an automatic. Piers offers a faulty

premise. Just because a forensic expert cannot tell whether the rifle was fired as an automatic or semi-automatic, assuming that to be the case, it is a different question to ask whether the shooter would have been aware that the rifle was capable of firing as an automatic. Whether the rifle was fired intentionally as an automatic or not would have had little bearing on the guilt or innocence of Piers as the person allegedly pulling the trigger. Thus, there was no ineffective assistance of counsel.

12. Jury Instruction about Weapon

Mr. Butler is alleged to have rendered ineffective counsel because he did not request a jury instruction that required the jury to find beyond a reasonable doubt that Piers knew the modified Norinco weapon could be operated as an automatic. Count 5 charged Piers with using, carrying or possessing a machine gun during or in furtherance of a crime of violence. The firearm at issue was a modified semi-automatic Norinco assault rifle, capable of being fired either as a semi-automatic or as a fully automatic weapon. In the direct appeal before the Ninth Circuit the appellate court found that the evidence was sufficient to support the jury's finding that the Norinco was capable of being fired as a semi-automatic as well as a fully automatic weapon.

The underlying factual issue at trial was whether Piers was the person who used the Norinco during

the robbery. If he was not, then it did not matter whether Piers knew whether the weapon was capable of being operated as an automatic. Rather than arguing that the manner in which Mr. Butler defended Piers as to Count 5 constituted ineffective assistance of counsel, the defendant claims he received ineffective counsel because of the absence of counsel's request for a jury instruction that even if the jury found Mr. Piers fired the weapon they must find beyond a reasonable doubt that Piers knew it was being operated in the automatic mode. Defendant's Post-evidentiary Argument, p.52. Piers has not shown how the outcome of his trial or his appeal would have been different had Mr. Butler chosen to focus on the knowledge Mr. Piers had of the Norinco assault rifle rather than denying that the gun was operated by Mr. Piers.

Piers cites *Staples v. United States,* 511 U.S. 680, 114 S.Ct. 1793 (1994) holding that "a defendant cannot be convicted of unlawful possession of a machine gun, 26 U.S.C. § 5861, unless the government has proven knowledge of the weapon's capacity to function as a machine gun," Doc. 249, p.52. The Ninth Circuit agreed that the modified Norinco's capacity to function as an automatic was proven at trial. Knowledge that a firearm can function as an automatic rifle for purposes of sentencing may be proved by circumstantial evidence. The sentencing judge heard the trial testimony. There was no ineffective assistance of counsel.

In closing, the prosecutor told the jury that Piers was not charged with unlawfully having a machine gun that is not registered; the jury was told that Count 5 addresses the use or carrying a machine gun during a crime of violence. The jury was told they would have to find that Piers possessed the machine gun in furtherance of the armed credit union robbery.

In his summation Mr. Butler told the jury that the defendant contested the allegations that he entered the credit union and the van and shot at the officer. Mr. Butler argued that the gun parts could just as likely have belonged to Franklin who lived with Piers for a period of time. Mr. Butler pointed out that Hubbard admitted that his fingerprints would be on the firearm. Mr. Butler challenged the jury to determine who owned the Norinco, who possessed it, and who fired it. He argued that they could not convict Piers without believing Raymond Hubbard, who had a motive to fabricate.

The court's jury instructions as to explained that Piers was charged in Count 5 with using, carrying, or possessing a machine gun during and in relation to or in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). The jury was instructed that in order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: (1) the crime of armed credit union robbery, as charged in Count 2 of the indictment, occurred. (2) The defendant knowingly used or carried a machine gun during and in relation to the crime charged in Count 2; or

knowingly possessed a machine gun in furtherance of the crime charged in Count 2, with all of [the jury] agreeing as to which alternative has been proved. The jury instructions defined the term "machine gun," and the word "used" with reference to the machine gun. The instruction defined the terms "carries a machine gun" and "in relation to the crime."

In, *Staples, supra,* the defendant was convicted of possession of an unregistered machine gun in violation of 26 U.S.C. § 5861(d). The Supreme Court held that the government should have been required to prove beyond a reasonable doubt that the defendant knew the weapon he possessed had characteristics that brought it within the statutory definition of a machine gun. Staples testified at trial that he was ignorant of any automatic firing capability of the weapon.

Count 4 of the indictment charged Piers with using, carrying, or possessing a Norinco, a semiautomatic assault weapon, during and in relation to or in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). In his jury instructions, Judge Holland instructed the jury that in order for Piers to be found guilty of that charge, the government must prove beyond a reasonable doubt the following elements: (1) the defendant committed the crime of armed credit union robbery as charged in Count 2 of the indictment. (2) The defendant knowingly used or carried a semi-automatic assault weapon during and in relation to the crime charged in Count 2, or knowingly possessed a semi-automatic assault weapon in

furtherance of the crime charged in Count 2, with all of the jury agreeing as to which alternative had been proved. *See*, Trial Tr. 5-73-74. The jury instructions did not violate *Staples*.

13. Character Witnesses

Piers contends that his attorney should have called character witnesses to testify on behalf of his good character, honesty, and history of law abiding behavior. Piers claims that he had repeatedly asked Butler to put on character witnesses but this contention is unsupported in the evidence. It is not disputed that the defense attorney did not call a single character witness. Mr. Butler explained at the evidentiary hearing that he was concerned that doing so would open up new issues that might be more favorable to the government than to the defense.

The character witnesses would have testified that they knew Piers to be a law abiding citizen and a person unlikely to shoot a gun at a policeman. Piers correctly states the law that a good character may be sufficient standing alone to create a reasonable doubt of guilt. *See Michelson v. United States*, 335 U.S. 469, 476 (1948); *Weedin v. United States*, 380 F.2d 657, 660 (9th Cir. 1967). However, a reasonably competent attorney would weigh the risk that character evidence could open the door to prejudicial evidence overriding the benefit of such evidence. Based on his testimony at the evidentiary hearing, I conclude Mr. Butler considered the character evidence but for strategic

reasons decided not to employ it. In light of the evidence of Piers's guilt offered at trial, it is most unlikely that evidence of good character would have been sufficient to establish a reasonable doubt that Piers committed the crime(s) as charged. There was no ineffective assistance of counsel.

14. Defendant not Testifying

Mr. Piers claims that he had a strong desire to testify but his attorney Mr. Butler "refused" to allow him to testify in his own defense. Motion to Vacate, Docket No. 203, p.16. Piers has offered no evidence either through his own testimony at the evidentiary hearing or through examination of Mr. Butler to support this allegation. Mr. Piers may have had a "strong desire" to testify but there is no evidence to indicate that he expressed that desire to his attorney who then "refused" to allow him to testify in his own defense.

Frequently one of the strategic decisions made at trial is whether the defendant should testify in his own behalf. There is no reason to believe that Mr. Piers did not acquiesce in his attorney's decision whether or not to call him as a witness, "When a defendant is silent in the face of his attorney's decision not to call him as a witness, he has waived his right to testify." *United States v. Nohara*, 3 F.3d 1239, 1244 (9th Cir. 1993).

Mr. Piers did not claim that he did not know of his right to testify at trial. Additionally, Piers has not

indicated what he would have said in this testimony or how that might have affected the outcome of his trial. The government points out that Piers would have had a hard time denying his association with Franklin, the former credit union employee, his possession of the plan to rob the credit union on his computer, his being clothed as the robber, the discovery of both his handgun and the Norinco parts in his room that matched the full automatic Norinco seized at the crime scene, and his arrest in the swamp near the scene where the robbers hid the second get away vehicle.

15. Voice Evidence

Mr. Piers faults his attorney for not offering evidence at trial of his distinctive voice to permit the victim tellers to compare it to that of the robber. This allegation is short on logic. How would Mr. Piers duplicate the sound of his voice that might have been made if he were the robber and how would his attorney have established a foundation that a particular victim teller had a recollection of the robber's voice sufficient to compare that with the defendant's? Such evidence could easily have backfired and been more damaging to Piers than to the government's case. Suppose the victim teller were to have concluded that it sounded like Mr. Piers's voice but he could not be sure? The suggestion of error in this regard is highly speculative and without legal foundation to place it in the category of constitutionally ineffective assistance of counsel.

16. Jury Instruction Re: Witness's Believability

At trial Mr. Butler expressed his desire to have the jury instructed in light of Hubbard's plea agreement to view Hubbard's testimony "with distrust." The jury was instructed that such testimony should be considered "with great caution." Piers argues that if the jury had been instructed to view Hubbard's testimony "with distrust," rather than with great caution the jury might have acquitted him on some or all counts.

The record indicates that Mr. Butler adequately argued to the jury that they should reject Hubbard's testimony in so far as it sought to place blame on Piers rather Hubbard. The failure to argue for Mr. Piers's "now favored language" do not constitute a failure to advocate on behalf of the defendant. Butler did initially request it so there was no ineffective assistance of counsel. The district court gave the relevant instruction from the 2000 Edition of The Ninth Circuit Model Jury Instructions, No. 4.12. Tr. 5-4.

17. Motion for Judgment of Acquittal

Piers argues that Mr. Butler should have moved for a judgment of acquittal under Federal Criminal Rule 29 on the issue of whether there was sufficient evidence to show that Mr. Piers, rather than Raymond Hubbard, fired the Norinco assault rifle. In making this argument Piers contends that Butler "completely nullified" Officer Reeder's testimony that

Hubbard, not Piers was the shooter. Whether or not Mr. Butler should have moved for a judgment of acquittal must be viewed in terms of the evidence before the trial court. The evidence presented was sufficient to support a jury's finding that Piers was the one who used the Norinco assault rifle during the robbery. Thus, viewing the evidence in the light most favorable to the government the trial court would not likely have granted a Rule 29 motion. Therefore, the second prong of *Strickland* – prejudice – was not met.

18. Overall Defense Strategy

Piers contends that Mr. Butler failed to develop a coherent theory of defense. He argues that this court should reject Butler's claim that he ever had a theory in mind. Piers acknowledges that Mr. Butler made some attempt to refute or explain the circumstantial physical evidence against Piers and attempted to discredit the testimony of government witness, Raymond Hubbard. Piers faults his trial attorney for not calling the jury's attention to Agent Henderson's testimony that she "always assume[s]" that co-conspirators are not telling the truth. Piers was also an alleged co-conspirator. Mr. Piers faults his attorney for not calling the jury's attention at closing to the forwarding address left by co-conspirator Franklin because arguably it could have lent credence to an argument that Mr. Franklin had access to the Nelchina Street residence where evidence was found. That address was Piers' family's address and would have implicated Mr. Piers as well.

Mr. Hubbard testified that he drove the getaway minivan. Mr. Piers suggests that Butler should have argued that Hubbard while driving, not Piers, fired the machine gun because forensics expert Shem testified that the machine gun could have been fired with one hand. The constitutional standard does not require an attorney to make every conceivable argument to the jury, particularly when under the facts that argument seems far-fetched. Mr. Shem testified that when the Norinco firearm is discharged with the stock extended it has a pivot that causes the weapon to start going up when fired. There were no bullet holes in the roof of the van, but there were bullet holes through the back of the van. Evidence found in Mr. Piers' home related to the serial number 21112 that was partially obliterated on the Norinco rifle itself. The rifle was found in Mr. Piers' bedroom. Other items found in Piers' residence fit within the assault rifle, including boxes of bullets. The evidence included casings from the van that bore identical markings as those Mr. Shem identified when he placed the same bullets from Piers' home into the weapon and fired them. Mr. Butler's summation adequately assisted the jury in analyzing the evidence although he could have developed his theory of defense better. Although Mr. Butler was tired from staying up late "thinking the case through" (Tr.5-41 to 42), as he told the jury, this does not mean he was "too exhausted," as Piers argues, to render competent counsel.

Piers faults Mr. Butler for conceding guilt on the conspiracy counts. Mr. Butler did not concede the defendant's guilt to all conspiracy counts. The attorney attempted to maintain credibility in the jury's eyes while trying to shift their focus from the other more serious charges. Piers essentially argues that because Mr. Butler did not argue sufficiently as to the new conspiracy counts, his strategy to concede guilt as to conspiracy was prejudicial under *Strickland, supra*. The test is not whether such a strategy was successful but whether it falls within the realm of competent representation. Mr. Butler's closing arguments to the jury denied 6 of the 7 charges against Piers and the government's case. The jury acquitted Piers of the October 1999 attempt to rob the credit union. That charge depended in part upon Hubbard's testimony.

United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991), cited by Piers is not as broad sweeping as Mr. Piers advocates. *Swanson* relies on *United States v. Cronic*, 466 U.S. 648 (1984) wherein counsel conceded guilt on the sole factual dispute before the jury. The holding in *Swanson* is inapplicable because Piers was charged with more than one offense and the strategy for a defense in the instant case was an effort to appeal to the jury to acquit him on one or more charges in the face of overwhelming evidence that he, Piers, had been involved in the criminal undertaking. Arguments which are manifestly designed to bolster credibility with the jury may be part of a reasonable strategy of arguing that the defendant operated independently of some of the charges he faces. Mr. Butler

did not perform deficiently in engaging in a "confess and avoidance" tactic in the instant case. *Compare United States v. Fredman*, 390 F.3d 1153 (9th Cir. 2004) (counsel admission during open statement in drug conspiracy prosecution that defendant was a "meth cook" and that he had been recently convicted in another state of drug crimes but argued to disassociate the defendant from a particular conspiracy for which he was being prosecuted did not provide ineffective assistance).

Piers has not shown that his attorney made errors so serious that his counsel did not function as the counsel guaranteed to him by the Sixth Amendment. The Supreme Court has recognized that an attorney may constitutionally acknowledge before the jury his client's short comings in order to build credibility with the jury and persuade it to focus it on all the relevant issues in the case. *See Yarborough v. Gentry*, 540 U.S. 1, 11 (2003). In *Fredman* the court recognized that by making concessions an attorney shows that he is earnestly seeking the truth and his comments on other matters in dispute will be received without the usual apparition surrounding the remarks of an advocate, Such strategy is the sort of calculated risk "that lies at the heart of an advocate's discretion." *Gentry*, 540 U.S. at 9.

Conclusion

Piers has not met the *Strickland* test of ineffective assistance of counsel as to any of his

claims against his trial or appellate counsel. **For the foregoing reasons the Motion to Vacate should be denied. IT IS SO RECOMMENDED.**

DATED this 10th day of April, 2006, at Anchorage, Alaska.

/s/ John D. Roberts
JOHN D. ROBERTS
United States Magistrate Judge

Pursuant to D.Ak.L.M.R. 6(a), a party seeking to object to this proposed finding and recommendation shall file written objections with the Clerk of Court no later than **NOON, Wednesday, April 26, 2006**, to object to a magistrate judge's findings of fact may be treated as a procedural default and waiver of the right to contest those findings on appeal. *McCall v. Andrus*, 628 F.2d 1185, 1187-1189 (9th Cir.), *cert. denied*, 450 U.S. 996 (1981). The Ninth Circuit concludes that a district court is not required to consider evidence introduced for the first time in a party's objection to a magistrate judge's recommendation *United States v. Howell*, 231 F.3d 615 (9th Cir. 2000). Objections and responses shall not exceed **five (5) pages** in length, and shall not merely reargue positions presented in motion papers. Rather, objections and responses shall specifically designate the findings or recommendations objected to, the basis of the objection, and the points and authorities in support. Response(s) to the objections shall be filed on or

before **NOON, Wednesday, May 3, 2006**. The parties shall otherwise comply with provisions of D.Ak.L.M.R. 6(a).

Reports and recommendations are not appealable orders. Any notice of appeal pursuant to Fed.R.App.P. 4(a)(1) should not be filed until entry of the district court's judgment. *See Hilliard v. Kincheloe,* 796 F.2d 308 (9th Cir. 1986).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM EDWARD PIERS, Defendant-Appellant.	No. 07-35342 D.C. No. 3:cv-04-00236-HRH 3:00-cr-0104-HRH ORDER (Filed Apr. 27, 2009)

Before: REAVLEY,* Senior Circuit Judge, TALLMAN and M. SMITH, Circuit Judges.

Judge Tallman and Judge M. Smith have voted to deny the petition for rehearing en banc, and Judge Reavley so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(f).

The petition for rehearing en banc is DENIED.

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* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.